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By EDWARD HYDE EAST, Esq.
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CHAP. XV.

BURGLARY.

Definition.

A breaking and entering the Mansion-House of another in the Night, with Intent to commit some Felony within the same. - - - § 1.

1. *What a breaking.* - - - § 2.

There must be a Breach procured by the Act of the Felons. *ib.* Not sufficient if Door left open and Thieves enter. Aliter of Chimnies. But sufficient if Door procured to be opened by Fraud. *ib.* Even through the Medium of legal Process. *ib.* Or by any false Suggestion or Pretence. *ib.* Or by Conspiracy with those within. *ib.* Or Threat of Force to them. *ib.*

But if the Owner from Fear throw Money to the Thieves without, no Burglary, but Larceny or Robbery. *ib.*

What a sufficient Breach of the House in Fact. § 3.

Taking out Pane of Window, drawing Latch, turning the Key of Door locked on the Inside, &c. *ib.*

Pushing open Trap Door over a Gateway which was kept closed by its own Weight. *ib.* Aliter where Glass of Window broken but not the Shutter. *ib.*

Or where Wall of Curtilage broken or overleapt. *ib.*

But breaking a Door in the *Inside* sufficient. § 4.

Though by one who lived in the House. *ib.*

Qu. of a Guest at an Inn breaking his own Chamber? *ib.*

Breaking *Fixtures* within, though annexed to the Freehold, not sufficient. - - - § 5.

Entry by Day or Night, and afterwards *breaking out* in the Night, declared Burglary by Stat. 12 Ann. c. 7. § 6.

2. *What an Entry.* - - - § 7.

If any Part of the Body be within the House. § 7.
Or any Instrument holden in the Hand and inserted for the Purpose of committing a Felony. *ib.* Qu. as to a Gun discharged at some Distance into the House? *ib.*
Entry need not be at same Time as breaking. *ib.*

3. *What a Mansion or Dwelling-house.* - § 8.
i. What *Buildings* are included in this Term. § 9.
Every House, Chamber, Room, &c. for dwelling, however situated. *ib.* But not a Booth or Tent. *ib.*
All *Outhouses* Parcel of the Messuage, or within the Curtilage and occupied with it, though not under the same Roof. - - - § 10.
Aliter, if there be a distinct Occupation, though under the same Roof, or within the same common Fence. *ib.*
ii. What *Inhabitancy* is required. - § 11.
Need not be continued if usual, or at certain Times of the Year. *ib.* But there must be animus revertendi. *ib.*
A mere casual Inhabitancy not sufficient. *ib.*
What a beginning to inhabit. - § 12.
Not the putting the House into a Workman's Hands to repair. *ib.* Nor putting in all the Tenant's Furniture, if he never slept there. *ib.* Nor even a sleeping there by Strangers or Workmen, for a particular Purpose, being none of the Owner's Family. *ib.* Nor even by a Servant for three Weeks before, he being placed there merely as a Guard at Night, not living there in the Day-time, nor the Owner ever intending to inhabit it. *ib.* Aliter, where an Executor sent his Servants into the House to inhabit generally, though he never slept there. *ib.*

4. *To whom the Mansion shall be said to belong.* § 13.
General Rule. *ib.*
i. What an *inhabiting suo jure.* - - § 14.
By Servants, or Officers, for their Employers. *ib.*
By Guests for their Hosts. - - § 15.
Qu. the Case of a Guest opening his own Chamber Door? *ib.*

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By Wife or Family for Husband, &c. § 16.

ii. What *Severance of Occupation* in the same House will make so many several Mansions in Law. § 17.

By Partners; though Rent and Taxes paid out of joint Stock. *ib.* Difference between temporary Partitions between two Strangers, and between a Stranger and the Owner, where one departs. *ib.*

Chambers in Inns of Court several Mansions, though Owner inhabits in the same Staircase. *ib.*

Inmates entering by same common Door with Owner have no separate Mansion. - - § 18.

Aliter, if Owner do not dwell there, or have a separate Entrance. *ib.* In which case another Apartment of the Inmate, though at a Distance from his Chamber where he slept, is Part of his Mansion. *ib.*

If Owner inhabit and enter by the same common Door, he cannot commit Burglary in the Lodger's Apartments. *ib.* But mere Occupation of the Owner, without inhabiting Part of House, makes no Difference as to Inmates. - § 19.

If Part of a House be severed by Lease, and a distinct Entrance, and Lessee do not inhabit it, no Burglary can be committed therein. - § 20.

Aliter, if there be the same common Entrance with the Owner to Part of what is so let. *ib.*

5. *What a breaking, &c. in the Night.* - § 21.

Not in the Twilight. *ib.* Aliter by Moonlight. Breaking one Night and Entry another, sufficient. *ib.*

6. *As to the Intent.* - - - § 22.

The breaking, &c. must be with Intent to commit some Felony within the House. *ib.* Aliter, where it was to get Money before taken by Breach of Trust. *ib.* Or to recover Goods for the supposed Owner. *ib.*

Qu. if Intent laid to rescue smuggled Goods made Felony by Statute? Semble sufficient, as to commit Rape. *ib.*

Trial. - - - - § 23.

Indictment,

Indictment, Appeal, Evidence, and Verdict. § 24.
Form of Indictment. *ib.* It must be charged *burglariously* breaking and entering. *ib.* In a Dwelling-house. *ib.* To whom belonging. *ib.* In the Night; the Hour to be laid. *ib.*
Intent. - - - - § 25.
If stealing alleged, and Intent to steal only proved, not sufficient. *ib.* Aliter, if Intent only alleged, and Fact proved. *ib.* If Intent were only to commit Trespass, not sufficient. *ib.* Nor if Intent to commit one Felony laid, and Proof of another. *ib.*
But sufficient always to allege the Felony actually committed. *ib.*
The same Fact may be laid with different Intents. § 26.
Other Offences compounded with Burglary laid in the same Indictment. - - - § 27.
Verdict and Judgment. - - - § 28.
How to be entered where Acquittal of Part of the Charge. *ib.*
Auterfoits acquit, where pleadable to a second Indictment for same Burglary, with a different Intent. § 29.
Clergy and Punishment. - - - § 30.
Reward. Certificate. *ib.*
Having Implements for Housebreaking in Possession. *ib.*

Burglary.

§ 1. *Definition.* 3 Inst. 63. 1 Hale, 549, &c. Sum. 79. 1 Hawk. ch. 38. s. 1. 4 Blac. Com. 224. Staundf. 30. 1 Bac. Abr. 539. Crompt. Just, 31.

BURGLARY, which is derived from the German burg, a house, and laron or latro, a thief, is a felony at common law, and is generally defined to be,—A breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether such intent be executed or not. The learning upon this subject will best be exhibited under the several parts of this definition.

1. *What is a breaking.*
2. *An entering.*
3. *A mansion-house.*
4. *Of whom.*
5. *In the night.*
6. *As to the intent.*

1. There

Ch. XV. § 2. *Breaking.*

1. There must be a breach of the house made or procured by the act of the felons; and this either by construction of law, or by actual force.

§ 2.

But though generally speaking every entry by a trespasser be a breaking in law, yet that is not sufficient in this case; for the words of the indictment are, feloniously and burglariously broke, &c. Therefore if the door or window be left open, and the thief enter and take away the goods in the night, that will not constitute a burglary. Though it is otherwise if a thief enter by a chimney, because it is as much inclosed as the nature of the thing will admit of. To amount to a breaking within this branch of the definition, the entrance must be obtained either by fraud, conspiracy, threat, or force; these will be illustrated by different examples.

1 Hale, 551, 2, &c. 3 Inst. 64. Kel. 67. 70. 1 Hawk. ch. 38. s. 4. Sum. 80, 1. 1 Bac. Abr. 539. 4 Blac.Com.226. Dalt.ch.151.s.3. Crompt.Just. 32.

Thieves having an intent to rob raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they bound the constable and robbed the owner; held burglary. So if admission be gained under pretence of business: or if one take lodgings with a like felonious intent, and afterwards rob the landlord: for the entrance was gained by fraud; and the law will not endure to have its justice defrauded by such evasions. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein.

By fraud. 1 Hawk. ch. 38. s. 5. 1 Hale, 552. 3 Inst. 64. Sum. 81. 4 Blac.Com.226. Kel. 44. 82. 2 MS. Sum. 300, 1, 4. Lemott's case, Kel. 42. Branton's case, O. B. May 1784. Sess. Pap. 738. Cassy and Cotter's case, Kel. 63. Farre's case, Kel. 43. Post. tit. Larceny.

At the Old Bailey sessions before Easter term 1704, Ann Hawkins was indicted of burglary: and upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country. That meeting with the boy who kept the key, she desired him to go with her to the house, and to induce him promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time, Holt C. J., Tracy, and Bury adjudged it to be clearly burglary in the woman; for she prevailed with the boy by fraud to open the door with intent that she might rob the house: and Lord Holt relied upon Le Mott's case.

Ann Hawkins's case, MS.Tracy, 80. & MS. Sum.

Ante, Kel. 42. & 63.

How

Ch. XV. § 2. *Breaking.*

How far it might be considered as a breaking, if a servant acting in confidence and with the assent of his master let robbers in by agreement with them to steal, but in truth with a view to their apprehension, was the subject of much debate and doubt in Eggington's case; which is elsewhere set forth.

Eggington's case, tit. Larceny, and post. 494.

By conspiracy.

In the next place, if A. the servant of B. conspire with C. to let him in to rob B., and accordingly A. in the night-time opens the door or window and lets him in; this is burglary in C.; but according to Dalton, ch. 99. only larceny in A.: yet by Lord Hale, it seems to be burglary in both; for if it be burglary in C., it must needs be so in A., because he is present and aiding C. to commit the offence: and Hawkins, who is of the same opinion, compares it to the case where divers come to commit burglary, and some stand to watch in adjacent places, and others enter and rob: for in all such cases the act of one is in judgment of law the act of all.

1 Hale, 553.

Burnet's MS. Sum. 81, 2. acc.

1 Hawk. ch. 38. s. 8, 9.

1 Hale, 439. 534, 5, 6. 3 Inst. 64.

Josh. Cornwall's case, 2 Stra. 881. 10 St. Tr. 433. n. 4 Blac. Com. 227.

Joshua Cornwall was indicted with another person for burglary; and it appeared that he was a servant in the house; and in the night-time opened the street door and let in the other prisoner, who robbed the house: after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted at the trial whether this were burglary in the servant, he not going out with the other. But afterwards at a meeting of all the judges at Serjeants' Inn, they were unanimously of opinion that it was burglary in both: and accordingly Cornwall was executed.

By threats.

There may also be a breaking in law, where, in consequence of violence commenced or threatened in order to obtain entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door, through which the robbers enter.

2 MS. Sum. 298. 1 Hale, 553. Crompt. 32. 1 Hawk. ch. 38. s. 4. post. s. 7.

Sum. 81. 2 MS. Sum. 300. 1 Hawk. ch. 38. s. 3. (Contra Dalt. ch. 151. s. 3.) Sav. 59. Crompt. 31.

But if the owner only throw his money out of the house to the thieves who assaulted it, this would not be burglary: though if the money were taken up in the owner's presence, it would be robbery. In all other cases where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house; though it need not be accompanied with any violence as to the manner of executing it.

Sum. 80.

As

As to what shall be considered as a sufficient breach of the house in point of fact.

§ 3. *Breach of what part of the house.*

The breaking a window, taking a pane of glass out by drawing or bending the nails or other fastening, the drawing a latch where the door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or fastening of a window with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; are all instances of a breaking. 2 MS. Sum. 80. 1 Hale, 552. 1 And. 114. 4 Blac. Com. 226. Hutt. 20. Dalt. ch. 151. s. 3. Crompt. Just. 31. b.

On an indictment for burglary in the dwelling-house of George Aldridge, it appeared that the place which the prisoner entered was a mill under the same roof and within the same curtilage as the dwelling-house. Through the mill was an open entrance or gateway capable of admitting waggons, and intended for the purpose of loading them more easily with flour, through a large aperture or hatch over the gateway communicating with the floor above. This aperture was closed by folding doors with hinges which fell over it, and remained closed by their own weight, but without any interior fastening; so that those without under the gateway could push them open at their pleasure by a moderate exertion of strength. In this manner the prisoner was proved to have entered the mill in the night, with the evident intention of stealing the flour. And Buller J. held this a sufficient breaking to constitute the offence; and the prisoner was accordingly convicted. Wm. Brown's case, Winton Sp. Ass. 1799. cor. Buller J. MS.

Where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken; this was ruled burglary by Ward Ch. B., Powis, and Tracy Js. and the Recorder. But they thought this the extremity of the law: and on a subsequent conference, Holt C. J. and Powell J. doubting, and inclining to another opinion, no judgment was given. Roberts's alias Chambers's case, O. B. before Hil. T. 1702. MS. Tracy, 80.

Lord Hale says, that by the 22 Ass. 95., which defines burglary to be a breaking of houses, churches, walls, courts, or gates, in time of peace; it seems that if a man have a wall about his house for its safeguard, and a thief in the night break the wall or the gates thereof, and finding the door of the house open enter the house; this is burglary; but otherwise if he had come over the wall of the court and found 1 Hale, 559. & *vide* Crompt. Just. 31.

Ch. XV. § 3. *Breaking.*

found the door of the house open. He states this doubtingly; and the book to which he refers seems more properly to apply to the walls or gates of a city than to a private house: and therefore this latter application of it never seems to have had any authority to support it. But at any rate the distinction between breaking and coming over the wall or gate is very refined; for if it be part of the mansion, for the purpose of burglary, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or over-leapt, and more properly to fall under the same consideration as the case of a chimney. And if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial; in neither case will it amount to burglary.

Vide post. s. 8.

Ante, 485.

§ 4. *In the inside.* 1 Hale, 553. Sum. 81.

But though a thief enter a dwelling-house in the night-time through the outer door being left open, or by an open window; yet if when within the house he turn the key of or unlatch a chamber door with intent to commit felony, this is burglary: and so it was adjudged on a special verdict at Newgate 1672. The same was lately ruled in Johnson's case by all the judges; where the prisoner entered at a back door of the house of William Hughes at Newington in Surry, which had been left open by the family; and afterwards broke open an inner door, and stole goods out of the room; and then unbolted the street door on the inside and went out.

Rex v. Johnson, Mich. T. 1786. MS. Buller J. & MS. Jud.

Vide post. s. 6.

Sum. 82. 1 Hale, 554. Keb. 67. 4 Blac. Com. 227. Rex v. Binglose, O.B. 2 W. & M. MS. Denton. Serjt. Forster's MS. Gray's case, 1 Stra. 481. Kel. 30. S. P. 1 Hale, 554.

A servant lay in one part of the house, and his master in another: between them was a door at the foot of the stairs which was latched. The servant in the night drew the latch and entered the master's chamber in order to murder him; and held burglary. So where a servant opened his lady's chamber door, which was shut with a spring lock, with design to commit a rape.

But Lord Hale doubts whether it would be burglary in a guest at an inn to open *his own* chamber door, with a felonious intent; because he had a special interest therein. And yet if another opened the guest's door burglariously, it must be laid to be the mansion of the innkeeper; and a guest may commit larceny of what is delivered to his charge.

Vide post. s. 15. & tit. Larceny.

§ 5. *Fixtures, &c.* Fost. 108. Poph. 84. Kel. 59. 69.

If the thief enter by the open door, and in the house break a trunk or box which was locked, this is no breaking to constitute

constitute burglary; because such things are no part of the house. Ch. XV. § 5. *Breaking.*

At a meeting of the Judges upon a special verdict in January 1690, they were divided in opinion upon the question, whether breaking open the door of a cupboard let into the wall of the house and fixed to the freehold were burglary or not. Lord Hale expressly says, that such breaking is not burglary at common law; though he thinks it sufficient to bring the case within the stat. 5 & 6 Ed. 6. c. 9. and 39 Eliz. c. 15.: founding the distinction upon Simpson's case, where he states that the breaking open of a chest in the house brought the offence within the stat. 39 Eliz.; which, if a moveable chest be meant, is denied by Mr. J. Foster to be law; for Simpson's case could not turn upon the circumstance of breaking a chest or a cupboard, as in fact both the inward and outward doors were broken. With regard to cupboards, presses, lockers, and other fixtures of the like kind, the same learned Judge thinks that in favour of life there ought to be a distinction between cases relative to mere property, as between the heir and executor, and such wherein life is concerned. In the former the law will presume the intention of the owner to have been to leave the house entire and undefaced. In the latter, such fixtures which merely supply the place of chests and other ordinary household utensils should be considered in no other light than as mere moveables partaking of the nature of those utensils, and adapted to the same uses. And Lord Hale, in another passage, seems to have inclined to the same opinion.

MS. Denton.
1 Hale, 527.
Ib. 508. 524, 7. *Vide* 2 Hale, 358.
Fost. 108. Kel. 31. 59. 69.
Fost. 109.
1 Hale, 555.

By stat. 12 Ann. c. 7. stating the law to have been doubted, it is *declared* and enacted, "that if any person shall enter into "the mansion or dwelling-house of another by day or by "night, without breaking the same, with an intent to com- "mit felony; or being in such house shall commit any felo- "ny; and shall in the night-time break the said house to get "out of the same; such person is and shall be adjudged to "be guilty of burglary, and shall be ousted of the benefit of "clergy in the same manner as if such person had broke and "entered the said house in the night-time, with an intent "to commit felony there."

§ 6. *Breaking out.* 12 Ann. c. 7. s. 3. Ante, s. 4.

Ch. XV. § 6. *Breaking.*

This was said to be law before the passing of the statute. But it had been doubted by Lord Holt and Trevor C. J. in the case of Elizabeth Clarke at the O. B. in 1707, upon a special verdict found by the direction of the former; in consequence of which the act was passed.

2 MS. Sum. 300. Sum. 81. MS. Tracy, 81. 1 Hale, 554. Dalt. ch. 151. s. 3.

2. There must be an Entry.

§ 7. *Entry.*

Where the house was broken but not entered, and the owner for fear threw out his money; it was holden to be no burglary: though clearly robbery, if taken in the presence of the owner. But if any part of the body be within the house, hand or foot; this at common law is sufficient, and has always been so ruled. And this Mr. Justice Foster says would be sufficient to bring the case within the statutes of Edward 6th and Eliz. with regard to house-breaking attended with larceny in the day-time.

1 Hale, 555. Sum. 80. 1 Hawk. ch. 38. s. 3. 7. Fost. 108. 3 Inst. 64. 1 And. 114. Crompt. Just. 32.

Rex v. George Gibbons, O B. 1752, cor. the Ld. Ch. B. and Foster and Birch Js. Fost. 107.

In Gibbons's case, evidence that the prisoner in the night-time cut a hole in the window-shutters of a shop, part of a dwelling-house, and putting his hand through the hole, took out watches, &c. was holden burglary though no other entry was proved.

2 MS. Sum. 298. 1 Hale, 553. 1 Hawk. ch. 38. s. 4. Crompt. 32. b. Sav. 59. Ante, s. 2. Sum. 80. Burnet's MS. 80. 3 Inst. 64.

Thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold; this was adjudged burglary by great advice. So putting a hook to steal, or a pistol to kill, within the door or window, though the hand be not in, is an entry.

1 Hale, 555. *Vide* 1 And. 115. 1 Hawk. ch. 38. s. 7.

But if a man shoot without the window, and the bullet come in; this seems, says Lord Hale, to be no entry to make burglary; though he subjoins a quære. And Hawkins expressly considers the discharge of a loaded gun into a house as an entry. And indeed it seems difficult to make a distinction between this kind of implied entry, and that by means of an instrument introduced within the window or threshold for the purpose of committing a felony; unless it be, that the one instrument by which the entry is effected is holden in the hand, and the other is discharged from it. No such distinction however is any where laid down in terms: nothing further appearing than that the entry must be for the purpose of committing a felony. According to which, where thieves had

had bored a hole *through* the door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house; yet as the instrument had not been introduced for the purpose of taking the property or committing any other felony, the entry was ruled incomplete. Ch. XV. § 7. *Entry.* O. B. 1785. Rex v. Hughes and others, cor. Willes J. and Hotham B. MS. S. C. 1 Leach, 452.

Also it appears from cases before mentioned, that if a person living within the walls of a mansion enter into any other apartment of the same with a felonious intent, that is a sufficient entry. Ante, s. 4.

The entry need not be at the same time as the breaking, provided both be in the night; therefore if thieves break a hole in the house one night, with intent to enter another night and commit felony, which they execute accordingly, it is burglary. 1 Hale, 551.

3. *What a Mansion.*

Next is to be considered what is such a mansion-house, the breaking and entering of which may amount to burglary. There seems to be three distinct objects of burglary mentioned in the books; 1. It may be committed, as it is said, against the walls or gates of a walled town. 2. Against churches. 3. Against private dwelling-houses. Of the first it is unnecessary to say any thing; and not much of the second in this place, further than to observe, that as it is evidently of a distinct nature from the last or common species of burglary, so many of the circumstances fit to be observed of the one are inapplicable to the other. I proceed therefore 3dly, to consider of burglary as it is now understood against a private mansion or dwelling-house. And this involves two questions: § 8. *Mansion-house.* 1 Hawk. ch. 38. s. 10. ch. 39. s. 17. 4 Blac. Com. 224. 3 Inst. 64. 1 Hale, 549. 556. Sum. 82.

1. *What buildings are included in the term mansion or dwelling-house.*
2. *What kind of inhabitancy is necessary to constitute it such.*

1. Every house for the dwelling and habitation of man is taken to be a mansion-house wherein burglary may be committed. Likewise a chamber or room, be it upper or lower, wherein any person inhabits or dwells, is a mansion-house in law. § 9. *To what the mansion extends.* 3 Inst. 64, 5.

Ch. XV. § 9. *Mansion.*

law. But this latter must be understood with certain restrictions which will be explained as I proceed. In this sense chambers in the inns of court are to be considered as the mansions of the several occupiers; though all under the same roof, and having the same common entrance.

1 Hale, 556. 1 Hawk. ch. 38. s. 13. Cro. Car. 474.

Turner's case, O. B. Feb. 1784. Leach, 249. (last edit. 342.) and Sess. Pap. p. 390.

Thomas Turner was indicted for burglary and larceny in the dwelling-house of Edward Whitmead. The prosecutor was coachman to Lady Hervey, and rented two lodging-rooms, (one of which was broken open by the prisoner,) which were situated over the coach-house and stables, and were rated in the parish books as appurtenances to the coach-house and stables, and not as dwelling-houses. The way to these was down a passage out of the public mews; and the entrance to the stair-case which lead to the rooms was through a door which was never fastened out of the passage leading to the coach-house and stables. There were separate doors at the top of the stair-case to each of the rooms, which were locked at night; and there were other rooms over the coach-house and stables situated in the same manner. It was contended that these rooms being intended as mere hay-lofts did not in contemplation of law form such dwelling-houses as to become the subject of burglary; but the judges upon reference to them were clearly of a different opinion: they thought the situation of the rooms could not alter the nature of the case; they were to all intents and purposes the habitation and domicile of the prosecutor and his family: and the prisoner had judgment for stealing to the value of 40*s.* out of the dwelling-house, having been acquitted by the jury of the rest of the charge.

Booths, &c. 1 Hawk. ch. 39. s. 17. 1 Hale, 557, 9. 4 Blac. Com. 226. *Vide* tit. Larceny.

But no burglary can be committed by breaking into any inclosed ground, or into any booth or tent, though the owner lodge therein: but in case of any robbery committed in these latter, a remedy is provided by the stat. 5 & 6 Ed. 6. c. 9.

§ 10. *Outhouses, &c.* 1 Hale, 558, 9. 1 Hawk. ch. 38. s. 12. Sum. 82. 3 Inst. 64, 5. 4 Blac. Com. 225. Dalt. ch. 151. s. 4. MS. Burnet, 82.

The mansion not only includes the dwelling-house, but also the outhouses, such as barns, stables, cowhouses, dairy-houses and the like, *if they be parcel of the messuage*, though they be not under the same roof, or joining contiguous to it. Therefore two were condemned at Cambridge in 1616 for breaking open a back house of Robert Castle's 8 or 9 yards distant

distant from the dwelling-house, only a pale reaching between them. And so it was agreed by all the judges in the time of Lord Ch. J. Hyde in 1665. And it is clear that any outhouse within the curtilage or same common fence as the mansion itself must be considered as parcel of the mansion. But no distant barn, warehouse, or the like, is under the same privilege; nor indeed any outhouse however near, if it be not parcel of the messuage, and so found to be.

William Garland was indicted for burglary in the dwelling-house of George Shore. The jury found specially that the prisoner broke and entered in the night-time, with intent to steal, an outhouse in the possession of G. S. and occupied by him with his dwelling-house mentioned in the indictment, and separated therefrom by an open passage eight feet wide: and that the said outhouse was not connected with the said dwelling-house by any fence inclosing both. In Easter term 16 Geo. 3. the judges were of opinion that there should be judgment for the prisoner; for the jury should have found it parcel of the dwelling-house, if it were so. In that case the outhouse being so separated from the dwelling-house, and not within the same curtilage or common fence, was not therefore protected by the bare fact of its being so occupied with it at the same time.

R. v. Garland, Somerset Lent Ass. 1776. MS. Gould J. *Vi. Green's case, O. B. Feb. Sess.* 1789, *cor. Thomson* B. *and Grose* J.

But if the outhouses be adjoining to the dwelling-house, and occupied as parcel thereof, though there be no common inclosure or curtilage, they may still be considered as parts of the mansion. Upon an indictment for burglary in the dwelling-house of Martin Graydon, and stealing oats therout; it appeared that the prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage, a cow-house, and barn, all in one range of building, in the order mentioned, and under one roof; but they were not inclosed by any wall or court yard, and had no communication from either to the other within. The prisoner stole the corn out of the barn at night; and after conviction, the judges upon a conference held it right; for the barn, which was under the same roof, was parcel of and enjoyed with the dwelling-house. Though there was some difficulty as to another point of the case hereafter noticed. Lord Hale puts this amongst other instances of outbuildings which he considers would be no parcel of the messuage; namely, if a man take a lease

R. v. G. Brown, Newcastle Sum. Ass. 1787, cor. Wilson J. MS. Gould & Buller Js. *vide* post. s. 14. S. C. & *vide* Gibson's case, post. 508.

Mich. T. 1787.

1 Hale, 559.

Ch. XV. § 10. *Mansion, Outhouses, &c.*

a lease of a dwelling-house from A., and of a barn from B. From whence it might be inferred, that be the other circumstances what they may, yet no outhouse holden under a different title from the dwelling-house can be the subject of burglary. But with great deference to so high an authority, the circumstance of an outbuilding being enjoyed by the occupier under a different title from his dwelling-house (a fact which cannot enter in any degree into the merits of the question) seems a very unsatisfactory reason of itself for excluding it from the same protection, if it be within the curtilage or under the same roof, and actually enjoyed as parcel of the dwelling-house in point of fact, and under such circumstances as would apart from the difference of title constitute it parcel of the mansion in point of law. It may be very different where part of a dwelling is severed from the rest by lease or otherwise, and in the distinct possession of another, as will presently be shewn.

Post. s. 20.

Rex v. Eggington and others, Stafford Sp. Ass. 1801. MS. Jud.

A manufactory carried on in the centre building of a great pile, in the wings of which several persons dwelt, but having no internal communication with the same, though the roofs of all were connected, and the entrances of all were out of the same common inclosure; held not a dwelling-house in which burglary could be committed.

John Eggington and several others were indicted for burglary, and stealing goods in the dwelling-house of Mathew Robinson Boulton. Another count laid the offence to be in the dwelling-house of John Bush; and a third in that of William Nelson. There were other counts not material to the present purpose. On the trial it appeared that Mathew Boulton (one of the persons whose property was taken) was concerned in different manufactures with different persons in whom the property taken was laid in the several counts: besides which he carried on two other manufactories on his own sole account. Some money and part of some silver taken were kept in a counting-house which was used for transacting the money concerns, and keeping the accounts of all the different businesses in which M. Boulton was engaged: other part of the silver was in a room, being one of several, where the plate business was carried on; which rooms and counting-house formed a centre, having two wings adjoining, consisting of dwelling-houses inhabited by persons engaged in M. Boulton's manufactories. One of them was inhabited by M. R. Boulton (mentioned in the first count); but that had no internal communication with the centre building at the time of the offence committed; a room in his house, which communicated with the centre building, having been allotted to the purposes of the plating business, with

with which he had no concern; and the door into it being shut up, and a working-bench placed against it, so as to stop the passage. One Bush (mentioned in the second count), a workman of M. Boulton's, occupied another of the dwelling-houses in the same wing; and from his house there was no way into the centre building: but there was in it a window which looked into a passage, that run the whole length of the centre building. In the other wing was the dwelling-house of W. Nelson, (the person thirdly named,) the partner of M. Boulton in the button business, which had no internal communication with the centre: and in that wing other persons lived. In the front of this building was a terrace or front yard, fenced round in different ways, and at the end of the pile of building, above described, by a wall with gates for horses and carriages and a door for foot passengers. It appeared that the prisoners entered the premises in the night by the help of Phillips a servant of the prosecutor's employed in the manufactory, (who had privately given information of the whole to his employers,) who opened the door for them into the front yard, from whence they passed along the front of the building, and round into another yard behind it called the middle yard; and from thence they and Phillips went through a door, which was left open, up a stair-case in the centre building leading to the counting-house and rooms where the plating business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, forced the door, and took from thence a quantity of silver, and returned by the way they came into the middle yard, where they were immediately apprehended. The prisoners were convicted; but the case was reserved for consideration on two points. After argument in the Exchequer-chamber before all the Judges, they all agreed on the first point, that the prisoners were not guilty of the burglary. That the centre building, which they had entered, and plundered, could not be considered as part of any dwelling-house; but a place for carrying on a variety of trades; and no parcel of the houses adjoining, with none of which it had any internal communication, nor was to be considered as under the same roof; though

Ch. XV. § 10. *Mansion, Outhouses, &c.*

May 9th, 1801.

Ch. XV. § 10. *Mansion, Outhouses, &c.*

though the roof of it had a connection with the roofs of the houses. But as to the second point, a majority held the prisoners guilty of the larceny (*a*).

§ 11. *Inhabitancy.* 1 Hawk. ch. 38. s. 11. 1 Hale, 556. Sum. 82. Kel. 52. 67. 3 Inst. 64. 4 Blac. Com. 224, 5. Moor, 660. 4 Co. 40. Poph. 52. Fost. 77.

2. The other point to be considered is relative to the *inhabitancy*, of which there must be some token either by the present or at least by the previous occupation of the owner or some part of his family, in order to make the mansion an object of this high protection of the law. However it is agreed by all, that a house wherein a man dwells but for part of the year, or a chamber in one of the inns of court, or of a college, wherein any person usually lodges, may be called his dwelling-house, whether any person were actually therein or not at the very time of the offence. Yet in all cases the owner must have quitted the house animo revertendi, in order to have it still considered as his mansion, where neither he nor any part of his family were in it at the time of the breaking and entering.

Rex v. Murry & Harris, O. B. East. 10 W. 3. MS. and MS. Denton and Chapple. Fost. 77. and Serjt. Forster's MS.

John Nicholls being possessed of a house in Westminster wherein he dwelt, took a journey into Cornwall, with intent to return, and sent his wife and family out of town, and left the key with a friend to look after the house: after he had been gone a month, no person being in the house, it was broke open in the night and robbed of divers goods. He returned a month after with his family and inhabited there. And adjudged burglary by Holt C. J., Treby J., and four other Judges.

Nutbrown's case, O. B. 1750. Fost. 76.

John and Miles Nutbrown were indicted for burglary in the dwelling-house of one Mr. Fakney at Hackney, and stealing divers goods. The prosecutor made use of it as a country house in the summer, his chief residence being in London. About the latter end of the summer preceding the offence, he removed with his whole family to his house in the city, and brought away a considerable part of his goods. And in the November following the house at Hackney was broken open and in part rifled; upon which he removed the remainder of his household furniture, except a clock and a few old bedsteads and some lumber of little value, leaving no bed or kitchen furniture or any thing else for the accommodation of a family. Mr. Fakney, being asked whether at the time he so disfurnitured his house he

(*a*) *Vide* S. C. at large on this point, tit. Larceny.

had

had any intention of returning to reside there, declared that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The fact of the burglary happened in the January following. But the court were of opinion, that the prosecutor having left his house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not be deemed his dwelling-house at the time the fact was committed: and accordingly the prisoners were directed to be acquitted of the burglary; but they were found guilty of the stealing.

Ch. XV. § 11. *Mansion-inhabitancy.*

If a man hire a shop in which he or his servant usually or often lodge, burglary may be therein committed: but generally speaking it seems that a mere casual use of a tenement as a lodging, or only upon some particular occasions, will not constitute it a dwelling-house for this purpose. In Brown's case all the Judges agreed that the fact of a servant having slept in a barn the night it was broken open and for several nights before, being put there for the purpose of watching against thieves, made no sort of difference in the question whether burglary or not. So a porter lying in a warehouse *to watch goods*, which is only for a particular purpose, does not make it a dwelling-house: but if all communication with the dwelling-house of which it is a part be not excluded, it may still be a part of the house in which burglary may be committed.

1 Hale, 557, 8.

Brown's case, post. s. 14.

R. v. Smith, M. 3 G. 1. by 10 Judges, Lord King's MS. 96. Serjt. Forster's MS.

Serjt. Hawkins states generally, that burglary may be committed in a house which one has hired to live in and brought part of his goods into, but has not yet lodged in: but he cites no authority to that effect except a passage in Kelyng 46. to which there is a quære subjoined. And this point has often since been ruled otherwise.

§ 12. *Taking possession.*

1 Hawk. ch. 38. s. 11.

Lyon Lyons and Thomas Miller were indicted for burglary in the dwelling-house of Edward Smith, with intent to steal, &c. But it appearing that the house was left to the care of a carpenter, who was to put it into repair; and that the prosecutor had never inhabited it, nor had servants or furniture in it; and that the former occupier had removed out of it about a fortnight; and it was at the time of the of-

Rex v. Lyons and Miller, O. B. Jan. 1778. Crown Cas. Res. MS. & MS. Gould & Buller Js. *vide* Leach, 169. (new edit. 221.) where it is said there were some goods in the house.

Ch. XV. § 12. *Mansion-inhabitancy.*

fence committed uninhabited; it was objected for the prisoners that the house was not in judgment of law the dwelling-house of Edward Smith. And after conviction, upon reference to the Judges, they held that this was no mansion-house, having never been inhabited by Smith. They were also of opinion that it was not burglary upon this indictment; for there were no goods in the house: and the indictment (charging the intent to steal) must be to steal the goods *then and there being;* and where nothing was in the house nothing could be stolen. Also it seemed to be the sense of the Judges; and Eyre B. declared it to be his opinion, that although some goods might have been put into the house, which is the case put in Kelyng 46., and there doubted; yet if neither the party nor any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed.

East. term 1778.

MS. Gould J.

Hallard's case, Exeter Sp. Ass. 1796, cor. Buller J. MS.

The former tenant of a house had quitted it, and the incoming tenant had put in all his furniture, and had been frequently there in the day-time; but had never slept in the house, nor any of his family. Buller J. held that burglary could not be committed therein. And the like case was ruled by Grose J. at the same period on the home circuit.

Thompson's case, Kingston Sp. Ass. 1796. 2 Leach, 893.

Fuller's case, O. B. Dec. 1782. Leach, 169. n. (last edit. 222.)

William Fuller being indicted for a burglary in the dwelling-house of Mr. Holland; it appeared that the house was a new one, and finished all but the painting and glazing; that a workman who was constantly employed by Mr. Holland slept in it for the purpose of protection; but no part of Mr. Holland's domestic family had yet taken possession of it. This was ruled by the Recorder, on the authority of Lyons' case, not to be the mansion-house of the prosecutor.

Harris's case, O. B. Oct. 1795. 2 Leach, 808.

On an indictment against John Harris for burglary in the dwelling-house of H. W. Dinsdale, it appeared that the prosecutor had lately taken the house near Cheapside, and on the night of the offence and for six nights before had procured two hair-dressers, none of his own family, to sleep there, for the purpose of taking care of his goods and merchandize therein deposited; but he himself had never slept there, nor any of his family. The Recorder ruled that the prisoner could not be convicted of the burglary.

Consonant to these authorities another case was lately ruled upon a similar subject, which, though apparently it goes further than the rest, yet in truth proceeds upon the same principle.

The

Ch. XV. § 12. *Mansion-inhabitancy.*

Rex v. John Davis, alias Silk, O. B. 1800. MS. Jud.

The owner of a house puts a person into it to sleep there at nights till he can get a tenant, in order to protect some furniture there which he had purchased of the last tenant, which servant had so slept there for three weeks before; but the owner never intended to inhabit it himself: wherefore a conviction for stealing the goods in the dwelling-house of such owner *to the value of* 40*s. was holden wrong, as to the capital part of the charge, within the stat.* 12 *Ann. c.* 7.

The prisoner was tried upon an indictment for stealing goods to the value of 40*s.* the property of Thomas Pearce *in his dwelling-house.* The house was a public house in Palace Yard, of which Pearce was the owner. About a month or six weeks before the felony was committed, the tenant, who had carried on the business there, gave up the possession to the prosecutor, who also purchased the furniture of him. The prosecutor resided in Milbank, where he carried on his business of a brewer; and never intended personally to reside in the public house, or to have the business of that house carried on upon his account; neither did any person inhabit his house in the day-time; but a servant of the prosecutor's had slept there constantly for about three weeks, solely for the purpose of protecting the furniture, till a tenant could be procured for the house. The prisoner was found guilty of the offence as charged in the indictment; but the question was reserved for the opinion of the Judges, whether by such occupation of the house by Pearce in the manner above stated it became his *dwelling-house*, within the meaning of the statute, so as to subject the prisoner to the capital part of the charge. In Trinity term 1800, the Judges held the conviction, as to the capital part of it, wrong; being of opinion, that as the master never intended to inhabit the house, it was not within the statute; and that it would have been no burglary if the house had been broken in the night. The prisoner was therefore recommended to mercy on condition of transportation, which would have been his punishment if the verdict had been properly taken.

Rex v. Jones and Longman, O. B 1689. Chapple's MS. 2 MS. Sum. 305.

A. died in his house; B. his executor put servants into it, who lodged in it and were at board wages; but B. never lodged there himself. Upon an indictment for burglary the question was, whether this might be called the mansion-house of B.? The court inclined to think it might, *because the servants lived there:* but upon the evidence there appeared no breach of the house.

4. *As to the Owner.*

§ 13. *In whose mansion.* Post. s. 24.

It is necessary to ascertain to whom the mansion belongs, and to state that with accuracy in the indictment. And here it is to be lamented that the same rule does not prevail in

Ch. XV. § 13. *In whose mansion.*

in this case as in arson, which is considered as an offence against the actual possessor by whatever title he may hold the possession. But in Burglary the rule is much more complex; the ownership being neither referable altogether to the legal title, nor to the possession, but partaking sometimes of one sometimes of the other, as well as of both. If the rule by which to ascertain this ownership may be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person; there, if he inhabit it either by himself, his family, or servants, or even by his guests, the indictment must lay the offence to be committed against *his* mansion. And so it is though he let out apartments to inmates, who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there, without any interference on the part of the proper owner; or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance; then the offence of breaking, &c. their separate apartments must be laid to be done against the mansion-house of such occupiers respectively. How far these general observations are well founded will best be seen by referring to the cases themselves from whence they have been drawn: and these may be considered in two points of view; as pointing out,

General rule.

1. *What shall be said to be an occupation or inhabiting suo jure, to make it the mansion of the party.*
2. *Where a severance of occupation in the same mansion shall constitute so many distinct mansions in law.*

§ 14. *What an occupation suo jure.* 1 Hawk. ch. 38. s. 13, 14. *By servants.* 1 Hale, 522. 557. Kel. 27.

1. If a person inhabit a dwelling-house, as the wife, guest, servant, or part of the family of another, it is the occupation in law of such other person, and must be so laid to be in the indictment. This rule holds with respect to all persons standing in the relation of servants. Thus apartments in the king's palaces, or in the houses of noblemen for their stewards and chief servants, can only be laid to be the mansion-house of the king or nobleman; as was long ago adjudged in the instances of Somerset House, and Whitehall and more recently

Ch. XV. § 14. *In whose mansion.*

cently in that of Chelsea Hospital; for in all these cases the occupation of the actual inhabitants is not in their own right, but as servants, or in the nature of such, representing their master: and therefore their occupation is that of the lord or proprietor of the whole mansion.

Chelsea Hospital or Peyton's case, O. B. May 1784. 1 Leach, 364.

At the sessions at the Old Bailey before Easter term 1704, Ann Hawkins was indicted for burglary in the mansion-house of Samuel Story: and upon the evidence it appeared that it was the house of the African company, and that Story was an officer of the company, and had separate apartments, and lodged and inhabited there. Whereupon it was ruled by Holt C. J., Tracy J., and Baron Bury, that Story's apartments could not be said to be his mansion-house, because he and others in similar situations inhabited them only as officers of the company: and for this the jury were discharged of this indictment; and it was laid as the mansion-house of the company. For though an aggregate corporate body cannot be said to inhabit any where, yet they may have a mansion-house for the habitation of their servants.

Ann Hawkins's case, O. B. 1704. MS. Tracy, 82. Fost. 38.

Burglary in the apartments of officers of a public company must be laid to be in the mansion-house of such company.

John Picket was indicted for burglary, and stealing bullion in the dwelling-house of the East-India company, which is inhabited by their servants; and was convicted and executed.

Picket's case, O. B. April 1765. Serjt. Forster's MS.

Maynard was indicted for burglary and felony in breaking and entering the mansion-house of the master, fellows, and scholars of Bennet College in Cambridge. The fact was, that he broke into the buttery of the college, and there stole some money: and it was agreed by all the Judges, upon reference to them, that it was burglary.

Charles Maynard's case, Cambridge Lent Ass. 1774. Serjt. Forster's MS.

George Brown was indicted for burglary in the dwelling-house of Martin Graydon, and stealing thereout oats. A 2d count stated it to be the dwelling-house of Thomas Trumball. Graydon who was a farmer had a dwelling-house in which he lived, a stable, cow-house, cottage, and barn, all in one range of buildings in the order mentioned, and under one roof: but they were not inclosed by any wall or court-yard, and had no communication from either to the other within. Trumball's family resided in the cottage by agreement with Graydon when he went into his service; but Trumball paid no rent; only an abatement was made in his wages on account of his family being to reside in the cottage.

Brown's case, Newcastle Sum. Ass. 1787, cor. Wilson J. MS. Gould & Buller Js. & MS. Jud. ante, s. 10. S. C. for another point.

Ch. XV. § 14. *In whose mansion.*

tage. Some corn having been missed out of the barn, Trumball and another person put a bed in the barn, and went and slept there, and on the fourth night after they had so done the prisoner unlocked the barn door and took away a quantity of oats. After conviction, judgment was respited upon a doubt whether it could be considered as the dwelling-house either of Graydon or Trumball. Upon a conference in Michaelmas term 1787, it was agreed by all the Judges that the sleeping in the barn made no difference. But they held (Buller J. doubting) that this was no more than a licence to Trumball the servant to lodge in the cottage, and not a letting of it to him. And that the barn as well as the rest of the buildings, being under the same roof, continued parts of the mansion-house of Graydon. And many of the Judges inclined that if there had been a demise to Trumball of the cottage, the barn would still have continued part of Graydon's dwelling-house in point of law.

MS. Gould J.

§ 15. *Guests.*

1 Hale, 554. 557.
2 MS. Sum. 305.

By the same rule, if the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper. It is indeed said in Dalton, c. 151. s. 4. that if the host of an inn break the chamber of his guest in the night to rob him, it is burglary. But this may justly be questioned: and there seems no distinction between that case and the case of an owner residing in the same house breaking the chamber of an inmate having the same outer door as himself; which Kelyng says cannot be burglary.

Kel. 84.

Abel Prosser's case, Monmouth Sum. Ass. 1768.
2 MS. Sum. 306.

One under pretence of being robbed forces the door of a guest's chamber in an inn in the night, and steals his goods; held, the burglary must be laid to be in the dwelling-house of the innkeeper, and not of the guest.

Abel Prosser was indicted for burglariously breaking, &c. the house of Nathan Levy, and stealing his property there. The prosecutor a Jew pedlar, came to the house of one Lewis a publican to stay all night, and fastened the door of his bed-chamber. The prisoner pretended to Lewis the landlord that the prosecutor had stolen his goods; and under this pretence he with the assistance of Lewis and others forced the chamber door open with intent to steal the goods mentioned in the indictment, and the prisoner accordingly stole them. These facts were found specially. Mr. Baron Adams, who tried the prisoner, doubted whether the bed-chamber could properly be called the dwelling-house of the prosecutor as described in the indictment, being truly a part of

Ch. XV. § 15.
In whose mansion.

of the dwelling-house of Lewis the innkeeper: he therefore reserved the point for the opinion of the rest of the Judges. And they all thought that though the prosecutor had for that night a special interest in the bed-chamber, yet it was merely for a particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger. That he had no certain and permanent interest in the room itself; but both the property and the possession of the room remained in the landlord, who would be answerable civiliter for any goods of his guest that were stolen in that room, even for the goods now in question; which he could not be unless that room were deemed to be in his possession. That the landlord might go into the room when he pleased, and would be no trespasser to the guest. Upon the whole, that this indictment was insufficient. Lord Hale puts this case: If A. be a lodger in an inn, and in the night he open the latch of his chamber door, and steal goods in the house and go away; it may be a question whether this be burglary? and, says the learned author, it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house: but he admits, that if A. had opened the chamber of another lodger in the inn, to steal his goods, that had been burglary. Now if the reasoning in the above case of Prosser be just and well founded; namely, that a guest has not even the possession of a room in an inn for himself, but it remains still in the possession of the host; that reasoning will bear very hard against the distinction which Lord Hale inclines to adopt in the above passage: and then the case of a guest in an inn breaking his own door to steal goods in the night will fall under the same consideration as a servant under the like circumstances: and this deserves to be well weighed before any final resolution upon the point.

1 Hale, 554.
4 Blac. Com. 227.
(Kel. 69.)
Vide ante, s. 4.
Vide Gowen's case, Mich. 1786. tit. Arson.

§ 16.
By wife or family.

As the possession of the servant or guest is the possession of the owner, so is the possession of any who in law are deemed to be part of the owner's family. Farre's case is very strong to this effect; where it was holden, that if the house of a feme covert who lives apart from her husband be broken, though the husband had expressly refused to have any thing to do with the lease, and the landlord had thereupon agreed with

Farre's case, Kel. 43.

Ch. XV. § 16. *In whose mansion.*

with the wife alone, yet it must be laid to be the house of the husband. But it seems to follow as a matter of course, that in any case where the law would adjudge the separate property of the mansion to be in the wife, and she has also the exclusive possession, the burglary ought to be laid against her mansion-house, and not against that of her husband.

§ 17. *Several tenements in the same house.*

2. *What severance of occupation in the same house will constitute so many several mansions in law?*

This is evidently the case where there is an actual severance in fact by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants.

Jones's case, O.B. Sept. 1790, cor. Lord C. B. Eyre & Gould J. Leach, 434. (new edit. 607.) *Several occupations of distinct parts of the same house, though by partners having a joint property therein, and paying the rent and taxes for the whole out of the joint stock, make several mansions.*

Martha Jones was indicted for burglary and larceny in the dwelling-house of Thomas Smith and John Knowles. The prosecutors were in partnership, and lived next door to each other. The two houses, which were formerly one, had been divided for the purpose of accommodating their respective families, and were then perfectly distinct and separated from each other, without any communication but by the street. The housekeeping was paid by each partner respectively for his own house; but the rent and taxes of both houses were paid jointly out of the partnership fund. The offence was committed in the house of Smith, to whom the prisoner was servant. It was objected, that although these two houses were the joint property of both the partners, yet they were the several and respective mansions of each; and therefore the offence ought to have been laid as committed in the house of Smith only. And the court, considering the objection to be well founded, directed the jury to acquit the prisoner of the capital part of the charge; and she was found guilty of the simple larceny only.

Tracy v. Talbot, Trin. 3 Ann. at Ni. Pri. Salk. 532.

In Tracy v. Talbot, Lord Holt was of opinion that if two several houses are inhabited by two several families who make or have but one common avenue or entrance for both; yet in respect of their original both houses continue rateable separately; and if one family go, one house is vacant. But if one tenement be divided by a partition, and inhabited by different families, viz. the owner in one, and a stranger in another; these are several tenements, severally rateable, while

Ch. XV. § 17. *In whose mansion.*

while they are thus severally inhabited; but if the stranger and his family go away, it becomes one tenement again.

With respect to the case of chambers in the inns of court, which have been before noticed in another view, they are to all purposes considered as distinct dwelling-houses: and therefore whether the owner happen to enter at the same common outer door or not will make no manner of difference. The sets are often held under distinct titles, and are in their nature and manner of occupation as unconnected with each other as if they were under separate roofs.

Ante, s. 9. Tracy's MS. 83. Evans v. Finch, Cro. Car. 473. W. Jones, 394. 1 Hale, 522, 3. 556. 1 Hawk. ch. 38. s. 11.

§ 18. *Inmates.*

Much doubt has formerly been entertained whether in the case of burglary in the hired apartment of an inmate, it shall be laid to be committed in the mansion of the inmate or of the owner. Lord Hale was of the former opinion; which is also argued for very elaborately by Hawkins, at least where the party has a fixed and certain interest in his apartment. As where one hires a distinct apartment in the house for his lodging for a certain time, though he enter at the same door with the other inhabitants, and therefore is but an inmate: because as long as it is severed by the lease, it is in the eye of the law as distinct from the other parts of the house, as if the person who rented it had a freehold or inheritance in it. This opinion of Hawkins is delivered generally, without reference to the distinction of the owner's residing or not in the same mansion. But his reasoning evidently tends to exclude any such distinction. But however convenient such a rule might have been, it certainly does not coincide with the current of authorities either ancient or modern. For the rule is now taken to be, according to the opinion of Kelyng, that if the owner, who lets out apartments in his house to other persons, sleep under the same roof, and have but one outer door common to him and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the one dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer doors, the apartments so let out are the mansion for the time being of each lodger respectively. And accordingly it was so ruled by Holt C. J. at the Old Bailey in 1701; although in that case the rooms were let for a year under a rent. And Tanner an ancient clerk of the court

1 Hale, 556. 1 Hawk. ch. 38. s. 13, 14.

Kel. 84. 4 Blac. Com. 225. Lee v. Gansell, Cowp. 1.

MS. Tracy, 83.

Ch. XV. § 18. *If whose mansion. Inmates.*

said, that the constant opinion and practice of the court had been according to the opinion of Kelyng C. J., which opinion was cited by Lord Holt.

Carrell's case, O. B. Feb. 1782. MS. Gould and Buller Js. *Vi.* 1 Leach, 273 S. C. n. a. *Where an inmate had two rooms, one in which he slept, and the other up stairs; held burglar. in the latter must be laid in his mansion; the owner retaining no part of the house.* (Eyre B. & Buller J.) Rogers's case, infra.

Richard Carrell was indicted for burglary in the dwelling-house of John Jordan. The house in which the offence was committed belonged to one Nash, who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week. Jordan had two apartments in the house, a sleeping room up one pair of stairs and a workshop in the garret, which he rented by the week as tenant at will to Nash. The workshop was the room broken open by the prisoner. In Easter term 1782 ten Judges against two held the offence well laid, and relied on the case of Rogers. The two Judges thought that it was not the mansion-house of Jordan, but that it might have been laid to have been the mansion-house of Nash: to which some of the others inclined if it were not the mansion of Jordan.

Trapshaw's case, O. B. Aug. 1786, and Hil. term 1787. MS. Jud. Leach, 333. S. C. (new edit. 478.)

In Trapshaw's case the facts were exactly the same as in Carrell's case: the owner let the house out to different lodgers, who had but one common outer door. The prosecutor Linney rented and occupied a room on the first floor, where he slept, and a parlour below, which latter was broken open and rifled by the prisoner. All the Judges, upon the authority of Carrell's case and Rogers's case, held that the indictment (which was on the stat. 3 & 4 W. & M. c. 9.) well laid the robbery to be in the dwelling-house of Linney, and that the conviction was proper.

Kel. 84. MS. Tracy, 82.

Hence it follows, that if a man let out part of his house to inmates, and continue to inhabit the rest himself; if he break open the apartments of such inmates, and steal their goods, it is felony only, and not burglary; for it cannot be burglary to break open his own house.

§ 19. *Occupation of owner without inhabiting.*

But a mere occupation of some part of the mansion by the owner, without inhabiting the same, makes no difference in the question of burglary with respect to tenants or inmates.

Rogers's case, M. 13 G. 3. MS. Gould and Buller Js. Leach, 84. S. C. (new edit. 104.)

William Rogers was indicted at the Old Bailey for burglary in the dwelling-house of Philip Chandler. It appeared that the owner let the whole of it in apartments to different persons, and did not inhabit any part of it himself. Chandler rented the bottom part of the house, consisting of a shop and a parlour and a cellar underneath; but the owner had taken

taken back the cellar for the purpose of keeping wood and lumber in it, deducting so much for it out of the rent. There was but one common outer door from the street, which communicated with the rest of the house as well as the shop and parlour in which the burglary was committed. Nine Judges present all agreed that the indictment properly laid the shop and parlour to be the mansion-house of the prosecutor; for that though the owner occupied the cellar, yet as he did not inhabit any part of the house, it could not be laid to be his dwelling-house; though if he had it would have been otherwise.

Ch. XV. § 19. *In whose mansion. Inmates.*

§ 20. *Severance by lease.*

But there may be such a severance by lease of part of a mansion as that it shall no longer be the subject of burglary.

If A. have a shop which is parcel of his house, the indictment must be for breaking the mansion-house of A.; but if it be severed by lease, and have no communication with the dwelling-house, by having a different entrance; then unless the lessee or his servant sleep there usually or often, no burglary can be committed in it. For it is not the mansion-house of A., being severed by the lease; nor can it be said to be the mansion-house of the lessee, if neither he nor his family ever dwell there, or if their sleeping there be only casual or temporary.

Burnet's MS. 83. 1 Hale, 557, 8. Kel. 83, 4. 4 Blac. Com. 225, 6. 1 Hawk. ch. 38. s. 16.

Kelyng has put the case of a man having a dwelling-house, who lets a cellar and a chamber in the house to J. S., reserving the rest of his house for his own dwelling; and the only passage to the cellar is out of a street; and if the cellar be broken open in the night, whether it be burglary? And he thinks not, because it was severed by the lease, and had no communication with the rest of the house. But this may well be questioned; for the cellar which was before parcel of the house is no more severed by the lease therefrom than the chamber which was also let to J. S.; and Kelyng admits that if the chamber were broken open it would be burglary, and should be laid to be the mansion of the owner; there being but one common entrance to him and the lodger. But if the cellar alone had been let, then clearly no burglary could have been committed in it. And this distinction seems fully to have been adopted in a late case of Gibson

Kel. 83, 4.

and

Ch. XV. § 20. *In whose mansion. Inmates.*

Rex v. Gibson and others, Kingston Lent Ass. 1785. MS. Gould and Buller Js. 1 Leach, 396. S. C.

and others; who were indicted and convicted of a burglary in the dwelling-house of Thomas Smith, and stealing the goods of John Hill. Smith was the owner of a house at Esher, in which he resided, and to which house there was a shop adjoining built close to the house; but there was no internal communication between the house and the shop; and no person lay in the shop; and the only door to the shop was in the court-yard before the house and the shop, which yard was inclosed by a brick wall 3 feet high, including both the house and shop. Smith let the shop together with some apartments in the house to John Hill from year to year at a rent. There was only one common door to the house, which communicated as well to Smith's as to Hill's apartments. A gate or wicket fastened by a latch in the wall of the court-yard next the road served as a communication both to the house and shop. The burglary was committed in the shop. And upon objection that that could not be said to be the dwelling-house of Smith, the point was referred to the Judges, who in Easter term 1785 were all of opinion that the indictment was well laid in describing it to be the dwelling-house of Smith, who inhabited in one part; and there being but one outer door; especially as it was within one curtilage or fence: and that the shop being let with a part of the house inhabited by Hill, still continued to be part of the dwelling-house of Smith, although there were no internal communication between them. But it was admitted that if the shop had been let by itself, Hill not dwelling therein, burglary could not have been committed in it, for then it would have been severed from the house.

5. *In the Night.*

§ 21. *Night.* 1 Hale, 551, 5. MS. Burnet, 82. 4 Blac. Com. 224, 6.

The breaking and entering must be in the night; though they need not be both in the same night: for if thieves break a hole in the house one night, to the intent to enter another night, and commit felony, and they accordingly do so through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both in the night; and, says Lord Hale, it shall be supposed, *that they broke and entered in the night when they entered;* for the breaking makes not the burglary till the entry. If this were the true legal supposition, which however by no means seems necessary to constitute that case burglary, it might have been applied

applied not improperly to the case before put by the same author where the breaking was in the day-time, and the entering at night; which he says will not be burglary, upon the authority of Crompton from 8 Ed. 2.; though it is observable that the resolution there only was, that if thieves enter in by night at an hole in the wall which was there before, it is not burglary: but it does not appear who made the hole, much less that it was made by the thieves themselves with intent to enter more securely at night. As to what shall be accounted night for this purpose; anciently the day was accounted to begin only from sun-rising, and to end immediately upon sun-set: but it is now generally agreed, that if there be day-light enough begun or left either by the light of the sun or twilight, whereby the countenance of a person may be reasonably discerned, it is no burglary: but that this does not extend to moon-light; for then many midnight burglaries would go unpunished. And besides, the malignity of the offence does not so properly arise, as Mr. Justice Blackstone observes, from its being done in the dark, as at the dead of night, when all the creation except beasts of prey are at rest, when sleep has disarmed the owner, and rendered his castle defenceless.

Ch. XV. § 21. *In the night.*

Crompton, 33. a.

4 Blac. Com. 224. 1 Hale, 550. Sum. 79. 3 Inst. 63. 1 Hawk. ch. 38. s. 2. 1 Bac. Abr. 541.

6. *As to the intent.*

§ 22.

The breaking and entry of the mansion in the night must be with intent to commit some felony therein, as murder, larceny, &c., whether the felonious intent be executed or not. For if the intention of the entry be either laid in the indictment or appear upon the evidence to be only to commit some trespass, as to beat any person in the house, it will not be burglary; and this although killing or murder may be the consequence of such beating. For though in case of homicide, if one premeditately intend to beat another very severely, and execute his purpose in such a manner as must necessarily breed danger, and death ensue in consequence, though beyond his original intent; he shall be said in law to have intended all the consequences, and therefore to have intended the felony; yet that intention is a deduction in law from the felonious act, and may be supposed to originate subsequent to the first purpose in the heat of blood consequent upon the execution of it. But in burglary it must be found that the entry was for a felonious purpose; *Vide* Kel. 47. though

1 Hale, 559. 561. 3 Inst. 65. Kel. 67. 1 Bac. Abr. 543. Hutt. 20. 1 And. 115. 1 Hawk. ch. 38. s. 18. 4 Blac. Com. 228. Staundf. 30. Sum. 79.

Ch. XV. § 22. *Intent.*

though if a felony be actually committed, that is primâ facie pregnant evidence of such an intent, unless the contrary appear.

Easter Sess. 1687. per Wright, Herbert, Atkins, Powell, & Holt. 1 Show. 53.

A servant who was entrusted by his master sells goods and conceals the money in the house; and after he is discharged from the service, breaks the house, and takes the money which he had concealed. This was holden to be no burglary, because the first taking of the money was not felony.

Rex v. Knight and Roffey, MS. Gould & Buller Js. & MS. Jud.

Breaking and entering a house in the night-time to recover tea which had been seized; held no burglary, being intended for the benefit of the supposed owner. Qu. If the indictment had laid the intent to be to rescue the goods seized, which is made felony by statute.

The prisoners were indicted for feloniously and burglariously breaking and entering the dwelling-house of Mary Snelling at East Grinstead in the night of the 14th November 1781, with intent to steal the goods of Leonard Hawkins, then and there being in the said dwelling-house. It appeared that L. Hawkins, being an excise officer, had seized 17 bags of tea on the same month at a Mrs. Tilt's, in a shop entered in the name of Smith, as being there without a legal permit, and had removed the same to Mrs. Snelling's at East Grinstead, where Hawkins lodged. The tea the witnesses said they supposed to belong to Smith: and that on the night of the 14th November the prisoners and divers other persons broke open the house of Mary Snelling with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses swore that they supposed the fact was committed either in company with or by the procurement of Smith. The jury were directed to find the prisoners guilty, on the point being reserved: and being also directed to find as a fact with what intent the prisoners broke and entered the house; they found that they intended to take the goods on the behalf of Smith. In Easter term following all the Judges held that the indictment was not supported; there being no intention to steal, however outrageous the behaviour of the prisoners was in thus endeavouring to get back the goods for Smith. But if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c., that being made felony by the stat. 19 G. 2. c. 34. the Chief Baron and some of the other Judges held that it would have been burglary. But even in that case it was agreed that some evidence must be given on the part of the prosecutor to shew that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid: but being found in oil-cases or in great

East. term, 22 G. 3. 1782.

great quantities in an unentered place would have been sufficient for that purpose. Ch. XV. § 22. *Intent.*

What felony.

The above opinion is in opposition to what was formerly supposed by some, that the felony intended must be of such a fact as was felony at common law, and not such as was since made so by statute; and Lord Hale inclines to that opinion. And therefore, says he, it has been doubted whether the breaking of a house in the night with intent to commit a rape be burglary or not. Crompton thinking it is not, because made felony by stat. Westm. 2. c. 34.; and Dalton thinking it would be burglary, because rape was felony by the common law; which Lord Hale thinks the more warrantable opinion. And indeed the matter is since put out of all doubt in regard to the particular case of rape, by the case of the King v. Locost and Villers, and the King v. Gray; wherein it was clearly holden that the breaking, &c. the house with such an intent was burglary. But still the general point remained in the same doubt as before: for rape was established to be felony at common law. Hawkins however, and after him Mr. Justice Blackstone, carry the rule further; and though the former seems to found himself chiefly upon the mistaken notion that rape was only made felony by statute, yet the reason assigned by both is general: and according to them it makes no difference whether the offence intended were felony at common law, or only created so by statute; *because wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law.* And it has been shewn before in the case of Knight, that the same reasoning was adopted by several of the Judges, though the point was not immediately before them in judgment.

1 Hale, 562.

Crompton, 32. Dalt. ch. 151. s. 5. Staundf. 81.

R. v. Locost and Villers, O. B. 1664. Kel. 30. Rex v. Gray, 1 Stra. 481. ante, 488.

1 Hawk. ch. 38. s. 19. 4 Blac. Com. 228.

Ante, 510. *Vide* R. v. Wells, East. term 1786. Ante, 414. post. Indictment.

Trial.

§ 23. *Trial.*

I do not find any thing worthy of special notice in regard to the trial of burglaries in general; it is governed by the ordinary rules which prevail in cases of felony. But I shall hereafter have occasion to refer to the stats. 25 Hen. 8. c. 3. and 5 & 6 Ed. 6. c. 10. with respect to the trial and punishment of those who are taken with goods in one county, which were obtained by burglary in another: and also to the stat. 10 Geo. 3. c. 48. concerning the receivers of certain goods obtained in the same manner.

Vi. tit. Larceny.

Indictment,

§ 24. *Indictment, &c.* 1 Hale, 549. 1 Hawk. ch. 38. per tot.

The indictment for burglary may run thus: that J. S. on such a day, in the night of the same day, with force and arms, the dwelling-house of A. B. feloniously and burglariously broke and entered, and then and there such and such things of the goods and chattels of the same A. B., in the same house then being, feloniously and burglariously did steal, take, and carry away; or, if no theft were actually committed, then, with intent the goods and chattels of the said A. B., in the same house then being, feloniously and burglariously to steal, take, and carry away; or, with intent the said A. B. there feloniously to kill, &c.; or both the felonious intent and the actual felony may be charged.

1 Hale, 550. 4 Co. 39. b. 5 Co. 121. b.

The offence must not only be laid to be done feloniously but also *burglariously;* which is a term of art, and cannot be expressed by any other word or circumlocution.

Breaking and entering. Ante. s. 2. 7. 1 Hale, 550.

It must be stated that the offender *broke* and *entered* the house; a breaking without an entry, or vice versâ, is insufficient.

Mansion. 1 Hale, 550. 556. 1 Hawk. ch. 38. s. 10. 4 Blac. Com. 224, 5.

Ante, 487. 491.

It must be laid to be done in a mansion or dwelling-house; and therefore if it be only said to be in the *house* of such an one, it is not sufficient. But this rule extends only to the case of burglary in a private house; for if, as has been hinted before, the offence may be committed by breaking open a church, or the gates or walls of a town, it seems agreed to be more proper to lay the indictment according to the truth of the fact; and therefore stating that the prisoner feloniously and burglariously broke and entered, &c. the parish church of D., &c. is sufficient. Where the burglary is in any out-house, which by law is considered part of the dwelling-house, it must still be laid to be done in the dwelling-house; or at least, as in Dobbs's case after mentioned, in the stable, &c. alleging it to be part of the dwelling-house: and in either case, the jury should find the fact, that it is parcel of the dwelling-house; according to the determination in Garland's case before mentioned.

Garland's case, ante, 493.

MS. Tracy, 79. 84. Moor, 661.

Post. s. 30.

But the indictment need not allege that any person was in the house; for this clause was inserted in after the stat. 23 H. 8. which takes away clergy where any person in the house was put in fear: and now the stat. 18 Eliz. takes away clergy in all cases of burglary.

It

Ch. XV. § 24. *Indictment, Evidence, &c.*

It is necessary to ascertain to whom the mansion belongs, and to state that with accuracy in the indictment; and therefore, where the prisoner was indicted for burglary in the dwelling-house of John Snoxall, and stealing therein goods the property of Ann Lock; and it appeared that it was not the dwelling-house of J. S. Buller and Grose Justices held that the prisoner could not be found guilty either of the burglary, or stealing to the amount of 40*s.* in the dwelling-house; for it is essential in both cases to state in the indictment the name of the person in whose house the offence was committed. In Cole's case it was stated to be the shop of one Richard ——— (leaving a blank for the surname); on which account it was doubted by B. R. whether it could be supported; though the Reporter says it was holden good.

Whose mansion. White's case, O. B. Feb. 1783. Leach, 216. (new edit. 286.)

W. Woodward's case, O. B. 1785. S. P.

Cole's case, Moor, 466. *Vide* 1 Hale, 558.

The indictment must not only state the fact to have been done in the night of such a day; but it ought also to express at about what hour of the night it happened: though it does not seem necessary that the evidence should strictly correspond with the latter allegation. In Waddington's case the indictment for burglary alleged the fact to have been committed in the night, but did not express at or about what hour it was done. Gould J. held the indictment insufficient as for a burglary, and directed the prisoner to be found guilty of simple larceny only. He said that as the rule now established was, that a burglary could not be committed during the twilight, it was therefore necessary to specify the hour in order that the fact might appear upon the face of the indictment to have been done between the twilight of the evening and that of the morning.

In the night. 1 Hale, 549. 2 Hale, 179.

Waddington's case, Lancaster Lent Ass. 1771. Burn's Just. tit. *Burglary.*

§ 25. *Intent.*

Further it must be alleged and proved, either that a felony was committed in the dwelling-house, or that the party broke and entered with intent to commit some felony within the same.

1 Hale, 550, 9.

Joseph Dobbs was indicted for a burglary in breaking and entering the stable of James Bayley, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one A. B. there being. It appeared that the gelding was to have run for 40 guineas, and that the prisoner cut the sinews of his fore-leg to prevent his running, in consequence of which he died. Parker Ch. B. ordered him to be acquitted; for his intention was not to commit the

Dobbs's case, Buckingham Ass. 30 July 1770. Serjt. Forster's MS. *Vide* 1 Hale, 561.

Ch. XV. § 25. *Indictment, Evidence, &c.*

felony by killing and destroying the horse, but a trespass only to prevent his running; and therefore no burglary. But the prisoner was again indicted for killing the horse, and capitally convicted.

But whatever be the felony really intended, the same must be laid in the indictment and proved agreeably to the fact.

O. B. Oct. 1700. Serjt. Forster's MS. & *vide* post. 519. R. v. Vandercomb and Abbot.

One was indicted for burglary and stealing goods. It appeared that there were no goods stolen, but a burglary with intent to steal; and not being so laid, as it ought to have been, Lord C. J. Holt directed the prisoner to be acquitted.

MS. Burnet, 83. 1 Hale, 561. post. s. 26.

And so if it be alleged that the entry was with intent to commit one sort of felony, and the fact appear to be that it was with intent to commit another; that is not sufficient.

Rex v. Locost and Villers, Kel. 30. 1 Hale, 560.

Though if the intended felony were actually committed, it is enough to lay the breaking and entering to be with intent to do so.

Jenks's case, O. B. June 1796, and before all the Judges in Mich. T. following, MS. Buller J. and MS. Jud. (2 Leach, 896. S. C.)

So where the indictment was for breaking, &c. the house of J. Davis, with intent to steal the goods of J. Wakelin, in the said house being, and there was no such person who had goods in the house: but J. W. was put by mistake for J. D.; the prisoner was entitled to an acquittal: and it was ruled that the words "*of J. W.*" could not be rejected as surplusage; for the words were sensible and material; it being material to lay truly the property in the goods; and without such words the description of the offence would be incomplete. This it seems is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B.; because that circumstance is perfectly immaterial in robbery, which is ousted of clergy generally; as was determined in Pye's case. Nor is this like Morris's case, where the name was so introduced as to make the sentence insensible.

Vi. tit. Larceny, s. 168. and Indictment—Surplusage.

But it seems in all cases sufficient, where a felony has been actually committed, to allege the commission of such felony; for, as Lord Hale observes, that is sufficient evidence of the intention. The stat. 12 Ann. c. 7. seems to have been drawn with that view. It is, besides, a general rule, that a man who commits one sort of felony, in attempting to commit another, cannot excuse himself upon the ground that

1 Hale, 560. Ante, s. 6.

that he did not intend the commission of that particular offence. Yet this it seems must be confined to cases where the offence intended is in itself a felony, according to the resolution in Dobbs's case before mentioned.

Ante, 513.

§ 26. *Different intents.*

But the same fact may be laid with several intents. In Thompson's case, which was an indictment for burglary, the first count laid the fact to be with intent to steal the goods of T. D.; the second count laid it with intent to kill and murder him. Upon a general verdict of guilty, it was objected that there were two several capital charges in the same indictment, which, it was said, tended to deprive the prisoner of so many challenges as he would be entitled to if the indictments were distinct; namely, 20 upon each. Another objection was, that it would tend to perplex the prisoner in his defence. But seven Judges (being all who were present at the conference,) held the indictment good. They said it was the same fact and evidence, only laid in different ways. Whereas in O'Connor's case, in Lord C. J. Ryder's time, there were two distinct felonies charged in several counts; one for hiring A. with intent to cause him to be enlisted in the French king's service; the other a similar charge with respect to B.: and in that case no judgment was given; the prisoner being discharged from the indictment by the consent of the attorney-general: and the rather upon the doubt whether the fact found amounted to the felony.

Rex v. Thompson, Norfolk Sum. Ass. 1781. MS. Gould J.

Mich. T. 1781.

See more under tit. Indictment, Joinder, and infra.

§ 27. *Different offences joined in same indictment, and severance by verdict.*

Further, the indictment may be so laid as to comprise other offences than burglary, though connected therewith; so that the prisoner may be acquitted of part and found guilty of the rest. As if the prisoner be charged that he feloniously and burglariously broke and entered the dwelling-house of J. S., and then and there certain goods of J. S. feloniously and burglariously did steal, &c.: the indictment comprises two offences, namely, burglary and larceny; and therefore he may be acquitted of the burglary if the case be so upon the evidence, and found guilty only of the larceny. But in such case, if the prisoner be acquitted of the larceny, it seems he cannot be found guilty of the burglary; because as it is thus charged, the larceny constitutes part of the burglary. For though the act of theft being charged is a sufficient allegation by intendment of law of the prisoner's felonious

1 Hale, 559. 2 MS. Sum. post. 517. R. v. Withal & Overend, and R. v. Hungerford. post. 518.

Ante, 514.

Ch. XV. § 27. *Indictment, Evidence, &c.*

felonious intention; yet when he is acquitted of that, there being no express charge of an intention to steal, it stands singly as if the indictment had been of a breaking and entering, &c. without any allegation of a felonious intent. And of this opinion was Lord Holt, at the Old Bailey, October 1700. Therefore says Lord Hale, the better way is to charge the prisoner with breaking, &c. with intent feloniously and burglariously to steal the goods, &c. therein, and to add also the particular felony: and then, though he be acquitted of the felony, the indictment stands good against him as for a simple burglary. The same author also thinks that three offences may be laid in the same indictment, namely burglary, larceny, and felony upon the statute 5 & 6 Ed. 6. c. 9. and the form of the indictment may run thus, That A. on, &c. in the night of the same day, with force and arms, at, &c. the dwelling-house of B., &c. feloniously and burglariously did break and enter, with intent the goods and chattels of the said B., in the said dwelling-house then and there being, feloniously and burglariously to steal, &c. and then and there, with force and arms, one silver cup, &c. of the said B. then and there being, feloniously and burglariously did steal, &c. the said B., his wife, and children, and family, in the said dwelling-house then and there being, against the peace, &c. And such indictment need not conclude against the form of the statute. Hereby the prisoner may be either convicted of the burglary and not of the larceny, or convicted of the felony within the st. 5 & 6 Ed. 6.; in either of which cases he is ousted of clergy; or he may be convicted of the simple larceny, and so have the benefit of clergy.

Ante, 514.

1 Hale, 560. 2 MS. Sum. MS. Burnet, 84.

§ 28. *Verdict and judgment.*

There is a note of a case of Rex v. Comer, which is in general circulation, wherein it was supposed that much depended upon the manner of entering the verdict: for in that case, upon an indictment for burglary (*a*) and stealing goods in the house of the value of 15*l.*, where the verdict was, "guilty of felony only in stealing goods to the value of 15*l.* from the dwelling-house, and not guilty of the burglary;" it was holden, that by a general acquittal of the burglary, which as the indictment was laid included (as was said) the breaking and entry and taking of the goods, the prisoner was by necessary

Comer's case, 30th Nov. 1744. 2 MS. Sum. Serjt. Forster's MS. S. C. Leach, 34. (new edit. 43.)

(*a*) By this must be understood breaking and entering the dwelling-house of such an one in the night-time, without laying it to be done with a felonious intent.

consequence

consequence acquitted of the felony also. But they agreed that if the entry of the verdict had been "not guilty of the "breaking and entering the house in the night-time, but "guilty of the rest of the indictment," the prisoner would then have been convicted of stealing goods to the value of 40*s.* in the dwelling-house, and been outsed of clergy by stat. 12 Ann. c. 7. But I have seen a note of this case of Mr. Justice Abney's, (wherein it is called Hugh Connor's case), which throws great doubt upon the accuracy of the above statement. From the latter it appears that Lord C. J. Lee, Parker C. B. and the Judges, Reynolds, Abney, Burnet, Denison, and Clarke, thought that the prisoner was ousted of clergy on the finding of the jury. Willes C. J. inclined that the indictment was ill. Wright J. contrà. The other three were absent. But upon the doubt conceived by the minority, and the prisoner having lain many months in prison, they all agreed to recommend him for a pardon on the terms of transportation. At any rate this was an over-strained nicety, which has been since corrected upon better consideration.

Ch. XV. § 28.

Verdict and judgment.

Vide 1 Hale, 559, 560. Summer's case, 1706. Com. Rep. 481.

Hungerford's case, post. 518.

Withal and Overend were indicted for feloniously and burglariously breaking and entering the dwelling-house of E. P., and stealing therein 60*l.* The jury found them not guilty of the breaking and entering the dwelling-house in the night, but guilty of stealing the money in the dwelling-house. It was objected for the prisoners that they were not excluded clergy, because the jury had acquitted them of the burglary, and there was no separate count in the indictment on the stat. 12 Ann. c. 7. for stealing in the dwelling-house to the value of 40*s.* This matter being reported to the Judges in Mich. term 1773, a great majority were of opinion that where a prisoner is indicted for a complicated offence comprehending in itself divers circumstances of aggravation, each of which is ousted of clergy; though he be acquitted of some of those circumstances, yet if he be found guilty of others from which the benefit of clergy is excluded, he shall receive sentence of death. As if one be indicted of burglary and stealing a sheep, and he be acquitted of the breaking, &c. but found guilty of the sheep-stealing, no other than a capital judgment can be pronounced against him. But a few of the Judges still doubting, the further consideration of the

Rex v. Withal and Overend, Guildford Ass. 1773. MS. Crown Cas. Res. & MS. Jud. Serjt. Forster's MS. (S. C. 1 Leach, 102.)

On indictment for burglary and stealing, &c. Defendant being acquitted of the breaking, &c. but found guilty of stealing above 40s. in the dwelling-house, is ousted of clergy.

case

Ch. XV. § 28. *Verdict and judgment.*

case was adjourned to Hilary term 1774, and in the mean time Lord C. B. Parker furnished the note of Comer's case first before mentioned. Finally, all the judges were of opinion that the prisoners were ousted of their clergy by this finding; for the indictment contained every charge necessary upon the stat. 12 Ann. c. 7. namely, a stealing in a dwelling-house to the amount of 40*s*., and the jury had found them guilty of that charge.

Hungerford's case, Bristol, 1790. MS. Buller J. *Manner of taking the verdict in case of burglary and felony joined.*

William Hungerford was indicted before the Recorder of Bristol for feloniously and burglariously breaking and entering the dwelling-house of J. H., and feloniously and burglariously stealing therein the goods, &c. of the value of 6*l*. The verdict was, "not guilty of the burglary, but guilty of stealing above the value of 40*s*. in the dwelling-house;" and the entry by the officer was in the same words. Judgment of death was given, but execution was respited till the opinion of the Judges could be taken. In Easter term 1790 the Judges, after some debate adjourned this case to the next term; and on the 21st of June following they held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury, which admitted of no doubt. That the minute was only for the future direction of the officer, and to shew that the jury found the prisoner guilty of the larceny only. But many of the Judges said, that when it occurred to them they should direct the verdict to be entered "not guilty of the breaking and entering in the night, but guilty of the stealing," &c.; as that was more distinct and correct. It appeared upon inquiry to be the constant course on every circuit in England upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "not guilty of murder, but guilty of manslaughter;" or "not guilty of murder, but guilty of feloniously killing and slaying:" and yet murder includes the killing. They added that the whole verdict must be taken together; and the jury must not be made to say that the prisoner is not guilty generally, when they find him expressly guilty of part of the charge; or to appear to speak contradictorily by means of the officer's using a technical term, when the verdict is sensible and intelligible in itself.

But

Ch. XV. § 28. *Verdict and judgment.*

Rex v. Turner and others, 1 Sid. 171.

But where several were indicted together for burglary (*a*), and for feloniously stealing goods, &c. in the house; it seemed to the two Chief Justices and others that the jury could not find one guilty of the burglary, and another guilty of the larceny only, upon the same indictment and the same evidence. In truth, such a finding shewed that the offences of the several prisoners were of a distinct nature, and therefore ought not to have been included in the same indictment.

§ 29. *Acquittal of burglary with one felonious act, and indictment for the same burglary with another such act.*

Rex v. James Vandercom and James Abbott, O. B. Jan. 1796. MS. Buller J.

An acquittal upon an indictment for burglary in breaking, &c. AND STEALING *the goods of A. and of B. and of C. cannot be pleaded in bar to an indictment for burglary in the same dwelling-house on the same night* WITH INTENT *to steal the goods of A. and B. Auterfoits acquit cannot be pleaded, unless the facts charged in the second indictment would, if true, have sustained the first indictment.*

It was formerly considered that a person indicted and acquitted for breaking and entering a dwelling-house in the night, and there stealing the goods of one person, could not be afterwards indicted for the same breaking and entering, and stealing the goods of another person; though he might be indicted of the simple larceny: but the cases in which that doctrine was established have been since denied to be law in the case of Vandercom and Abbott. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, &c. *with intent* to steal their goods therein being: to which they pleaded auterfoits acquit upon a former indictment, charging the same facts, with this difference, that instead of the breaking, &c. being laid *with intent to steal*, &c. the indictment charged an actual stealing of certain goods of Merial Nevill, and certain other goods of Ann Nevill, and certain other goods of one Susanna Gibbs (*b*), and concluding with an averment of the identity of the persons, and that the two indictments were for the same burglary. The case was argued upon demurrer before all the Judges, and they unanimously held the plea bad: the grounds of which judgment were afterwards stated by Buller J. at the Old Bailey in June 1796. He began by observing that on the part of the prisoners it was contended, that as the dwelling-house mentioned in the two indictments, and the times mentioned in each when the offence was committed, were the same, therefore the offence was the same, and the acquittal on the

(*a*) *Vide* ante, p. 516. n. (*a*).

(*b*) Mr. Justice Buller in delivering the opinion of the Judges on this case observed, that the property in the goods was differently described in the two indictments, which might afford another objection to the plea; but that he had not entered into the consideration of that circumstance, as the case did not require it. MS. Buller J.

former

Ch. XV. § 29. *Auterfoits acquit.*

former indictment a bar to the present. And further, that burglary was defined to be a felonious breaking and entering of a mansion-house in the night-time, to be completed by felony or an intention to commit it. And that two cases in Kelyng were relied on in support of the plea of auterfoits acquit. (After stating the two indictments he proceeded,) The question is, Whether the several offences described in the two indictments can be said to be the same? That there was only one act of breaking the house, and a felony committed only at one time, must on this record be taken to be clear: but that does not decide the question. The crime of burglary is of two sorts (*a*); 1. breaking and entering a dwelling-house in the night-time, and stealing goods there: 2. breaking and entering a dwelling-house in the night-time with intent to commit a felony, though that felony be not committed. The circumstance of breaking and entering the dwelling-house is common and essential to both, but it does not of itself constitute the crime in either; for there must be a felony committed or intended, without one of which the crime of burglary does not exist: and these offences are so distinct in their nature, that evidence of one will not support an indictment for the other. For example, if a man be indicted for breaking and entering a house in the night and stealing goods there, evidence that he broke, &c. and intended to steal goods, or to commit any other felony, would not support the indictment. In the case of the present prisoners, the evidence applicable to the indictment now depending, which is for breaking, &c. with intent to steal, was not evidence to prove the first indictment for breaking, &c. and stealing goods. Then if the crimes are so distinct that evidence of one will not support the other, it is inconsistent with reason to say that they are so far the same that an acquittal of one shall be a bar to a prosecution for the other. Neither do legal authorities support such a proposition. The two cases quoted on behalf of the prisoners were Turner's case, Kel. 30. and Jones and Beaver's case,

(*a*) Quære, whether the definition of the crime be not solely resolvable into the breaking, &c. with intent to commit felony; of which the actual commission is such a strong presumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging the breaking, &c. to be *with intent* to steal is said to be supported by proof of actual stealing (ante, 514.) though certainly not vice versâ.

Kel.

Kel. 52. William and James Turner were indicted for burglary in breaking and entering the dwelling-house of Mr. Tryon in the night, and stealing therein a large sum of money; on which James was found guilty, but William was acquitted. Afterwards, there being strong evidence that William was concerned in the same burglary, and there being 47*l.* of the money of one Hill, a servant of Mr. Tryon, stolen at the same time, which was not laid in the former indictment, it was intended to indict him a second time for the burglary in breaking, &c. the house of Mr. Tryon, and stealing the 47*l.* of the money of Hill. But it was agreed, says the reporter, that William Turner could not be indicted again for the same burglary, though he might be indicted for felony for stealing the money of Hill. That case was no solemn judgment; for the prisoner was not indicted a second time for the burglary. It was merely a direction from the Judges to the officer of the court how to draw the second indictment; and it proceeded upon a mistake as I shall presently shew. If the Judges in that case exercised a little lenity before the indictment, which might more properly have been done after a conviction, much censure could not fall on them. But they proceeded on the ground that the prisoner having been indicted for burglary in breaking the house of Mr. Tryon and stealing his goods, and acquitted thereof, he could not be indicted again for the same burglary, *for breaking the house;* though he might be indicted for felony for stealing the money of Hill; for they were several felonies, and he was not indicted of that felony before. And he was indicted accordingly. In that case the Judges went on the idea that the breaking the house and the stealing the goods were distinct offences, and that breaking the house only constituted the crime of burglary; which was a manifest mistake. The burglary consisted of breaking the house and stealing the goods; and if the stealing the goods of Hill were a distinct felony from that of stealing the goods of Tryon, (which they admitted it to be,) the burglaries from necessity could not be the same. In that case the fact was, that the prisoner broke the house of Tryon, and stole the money both of Tryon and of Hill at the same time. He had been tried for breaking the house and stealing the money of Tryon, and might have been convicted if the prosecutor had used due diligence about his evidence;

Ch. XV. § 29. *Autrefoits acquit.* (Turner's case, Kel. 30.)

Ch. XV. § 29. *Auterfoits acquit.*

so that the prisoner's life had been in jeopardy: but still the Judges held that he might be tried for the other part of the same act, viz. stealing the money of Hill. If no money of Tryon's had been in the house or been stolen, probably the question never would have arisen in Turner's case; for then the first indictment would have been wholly inapplicable to the facts of the case, and the prisoner in no danger at all upon it: but that circumstance could not vary the law of the case; and the opinion certainly proceeded from the want of adverting to what was necessary to constitute the crime of burglary. The case of Jones and Beaver proceeded wholly on that of Turner: and if the foundation fail, that case must also fall. There the prisoners were indicted for burglary and stealing the goods of Lord Cornbury; and being acquitted, were afterwards indicted for the same burglary in breaking, &c. and stealing the goods of Mr. Nunnesy: and it was agreed, that being acquitted once, they could not be indicted again for the same burglary; but that they might be indicted for stealing the goods of N., (according to Turner's case.) But authorities are not wanting to shew the principle and foundation on which a plea of auterfoits acquit is to be sustained. (He then referred to 2 Hawk. ch. 35. s. 3. Fost. 361, 2. and Rex v. Pedley, B. R. Tr. 1782.) These establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment; an acquittal on the first indictment can be no bar to the second. To apply that principle to the present case: the first indictment was for breaking and entering the house and stealing the goods: if it were proved on that indictment that the prisoners broke and entered the house with intent to steal the goods, but had not stolen them, (which are the facts contained in the present indictment,) they could not have been convicted on that indictment by such evidence. They have not then been tried, nor were their lives ever in jeopardy for this offence, which is for breaking the house with intent to steal the goods. For these reasons the Judges are unanimously of opinion that the plea is bad; that there must be judgment for the crown on the demurrer; and that the prisoners must take their trial upon the indictment now depending.

(Jones and Beaver's case, Kel. 52.)

As

Ch. XV. § 30.

§ 30. *Clergy, punishment.* 18 Eliz. c. 7. 3 W. & M. c. 9. s. 2. 1 Hale, 562. 2 Hale, 361. 2 Hawk. ch. 33. s. 104, 105, 6.

As to the punishment for this offence; by stat. 18 Eliz. c. 7. "Every person and persons who shall commit burglary, "and be found guilty by verdict, or be outlawed, or who "upon arraignment shall confess the same, shall suffer death "and forfeit as in cases of felony, without benefit of clergy." And by stat. 3 W. & M. c. 9. s. 2. clergy is also taken away if the offender "stand mute, or do not directly answer, or "challenge peremptorily above 20." And this latter stat. (s. 1.) also ousts of clergy "every person who shall counsel, "hire, or command, any person to commit any burglary, "being thereof convicted or attainted, or being indicted "thereof and standing mute, not directly answering, or "challenging above 20." Also by the stat. 1 Ed. 6. c. 12. s. 10. "Persons attainted or convicted of breaking any house "by day or by night, any person being therein and thereby "put in fear or dread, or being indicted or appealed there-"of, and thereupon found guilty by verdict, or who shall "upon arraignment confess the same, or will not directly "answer, or stand wilfully or of malice mute, shall not be "admitted to the benefit of clergy."

1 Ed. 6. c. 12. s. 10. *vide* tit. Larceny.

By stat. 5 Ann. c. 31. s. 5. (which is principally levelled at the receivers of stolen goods,) "any person who shall "receive, harbour, or conceal any burglars, &c. knowing "them to be so, shall be taken as accessary to the said "felony, &c. and being thereof legally convicted by the "testimony of one or more credible witnesses, shall suffer "death as a felon convict."

5 Ann. c. 31. s. 5. *Accessaries after.*

Also, persons indicted in one county for stealing goods obtained by burglary in another county are ousted of clergy, as is elsewhere shewn.

Vide tit. Larceny, s. 157.

A reward of 40*l.* and certificate of exemption from parish offices are given upon the conviction of burglars by several statutes; and also a pardon to an offender out of prison discovering two or more accomplices.

See general tit. Rewards, &c.

As a means of preventing this offence, persons apprehended, having upon them any implements of housebreaking, shall by stat. 23 Geo. 3. c. 88. be deemed rogues and vagabonds within the vagrant act 17 Geo. 2. c. 5.

23 G. 3. c. 88.

CHAP. XVI.

LARCENY AND ROBBERY.

Larceny.

Introduction. - - - - § 1.

Definition.—The fraudulent or wrongful taking and carrying away by any Person of the mere personal Goods of another, from any Place, with a felonious Intent to convert them to his (the Taker's) own Use, and make them his own Property, without the Consent of the Owner. - - - § 2.

I. *What a mere taking.* - - § 3.

There must be a taking in fact of the Thing, sufficient to constitute a Trespass, either from the actual or constructive Possession of the Owner. *ib.*

If Delivery to the Party be voluntary, no subsequent Conversion will make it Trespass. Aliter, if Delivery obtained by Force, Threat, or Fraud. *ib.*

Instances of felonious taking on a Privity of Bailment determined; on a bare Charge; on Possession obtained by Fraud; or upon a colourable Gift extorted by Fear. *ib.*

Taking by the Hand of the Law, or of an innocent Person. *ib.*

II. *What a carrying away.* - - § 4.

The least Removal of the Thing from the Place where it was, though not carried off. *ib.* Carrying Sheets from a Bed into the Hall. *ib.* Taking Horse in a Close, though detected before he got it out. *ib.* Removing Parcel from one End of Waggon to another. *ib.* But not setting Package upright in the same Place when it was lying lengthways, it not being entirely lifted off from the spot. *ib.*

Nor

Nor taking Purse out of Owner's Pocket, or Shop, to which it still continued fastened by a String. § 4.

Nor if in struggling the Purse fall to the Ground, the Robber not having hold of it, &c. *ib.*

But snatching an Ear-ring out of the Ear by Force, though it were lost again instantly and fell into the Party's Hair, is sufficient. *ib.*

If the Thief once take, though he immediately return the Thing again, it is Larceny. § 5.

Where there is one continuing Transaction, all may be guilty as Principals, though several distinct Asportations; if all concur before final Asportation from virtual Custody of Owner. - - § 6.

III. *By whom in particular Larceny may be committed.* - - - § 7.

1. Not by Joint Tenants. *ib.*

But by one of his own Goods from the Custody of another, having special Property in them, and with fraudulent Intent to charge him or the Hundred for the Value. *ib.*

2. But not by *Wife* from her Husband. - § 8.

Nor by any other from him by her Delivery. *ib.*

Nor by Wife from any other in Husband's Presence. *ib.*

Aliter, if by his Command in his Absence. *ib.*

On Indictment against both, Husband may be acquitted and Wife convicted, as well as vice versâ. *ib.*

Where it lies on Wife to prove her Marriage. *ib.*

3. *By Servants*, of the Things entrusted to their Charge or Custody. - - - § 9.

i. Upon Stat. 33 H. 6. c. 1. making Spoil of Masters Goods on their Death. *ib.*

ii. Upon Stat. 21 H. 8. c. 7. - § 10.

Servants withdrawing themselves with Things delivered to them by Masters to keep, or embezzling them to the Value of 40*s.* made Felony; but Clergy not ousted, unless Goods taken out of Dwelling-house, &c. by Stat. 12 Ann. c. 7. *ib.*

Nor as it is said Offenders transportable; sed Quære. *ib.*

To

To what Servants and in what Instances the Statute extends. - - - § 11.

Not to Apprentices: but they are liable at common Law. *ib.*

To what Goods. Such as are delivered by Master to the Servant to be returned in Specie. § 12.

Form of Indictment thereon. - - § 13.

iii. By common Law Servants having only a bare Charge or Custody of their Master's Goods may be guilty of Larceny in taking them, on the Principle that Possession of Servant for the Master is Possession of Master. - - - § 14.

As where a daily Clerk embezzled a Bill of Exchange delivered to him by his Master to send by the Post. § 15.

Or where a Tradesman's Servant broke open and purloined a Package of Goods delivered him to carry to a Customer. *ib.*

Or where a Servant went off with Money delivered to him to carry to another. *ib.*

Or where one entrusted with his Master's Cash Concerns got a Bill discounted in order to abscond with the Money, which he did. *ib.*

Aliter, where Master had no otherwise the Possession than by Receipt of the Servant by Delivery of another for his Master's Use, in which Case Embezzlement of the Servant no Larceny at Common Law. § 16 & 17.

Unless where Servant has first done some act to determine his original exclusive Possession, as by depositing the Goods in his Master's House, Barge, &c. *ib.*

Or where he separates part from the Rest, and conveys it away from the Vessel on board which his Master had purchased it. *ib.*

And now by Stat. 39 Geo. 3. c. 85. Servants or Clerks receiving Money, Goods, Bonds, &c. or other valuable Securities or Effects on Account of their Masters, &c. and fraudulently embezzling the same, shall be deemed to have feloniously stolen the same; and are subjected to Transportation not exceeding 14 Years. - - - § 18.

4. *By*

4. *By Officers and Servants of the Bank.* - § 19.
Felony without Clergy by Stat. 15 Geo. 2. c. 13. s. 12. 35 Geo. 3. c. 66. and 37 Geo. 3. c. 46. in such Persons embezzling any Note, Dividend-Warrant, Security for Money or Effects, &c. belonging to or deposited with the Bank.

5. *By Officers and Servants of South-Sea Company.* § 20.
The same Provisions as above.

6. *By Persons employed in or by the Post-Office.* § 21.
Secreting, embezzling or destroying any Letter, &c. entrusted to their Care or coming to their Possession, containing any Bank Note, Bill of Exchange, &c. Dividend-Warrant, &c. Felony without Clergy by Stat. 7 Geo. 3. c. 50. - - § 21.
Though Defendant have not taken the Oath required by Stat. 9 Ann. c. 10. s. 41. of Persons employed by the Post-Office. *ib.*
Qu. Whether one indicted as *Charger and Sorter* of Letters for such embezzling may not be convicted thereof as Sorter only. But if acquitted on special Count, he cannot be convicted on general Count as a Person employed in the Post-Office, being no otherwise employed than as Sorter. *ib.*
A Bill of Exchange may be laid as a Warrant for the Payment of Money within the Act. - § 22.
Stealing Letter containing Money not within the Act. *ib.*
Indictment for *secreting two Letters* containing therein a Bank Note, and Proof that the Bank Note was sent in Halves on different Days, held within the Act. *ib.*
Aliter perhaps of a *Taking* which means the original Taking. *ib.*
Qu. As to secreting Letter containing a Bank Note, not knowing the contents, with Intent to embezzle Postage paid. - - - § 23.
Semble within s. 19 of 5 Geo. 3. c. 25. which makes it Felony to embezzle Postage received with Letter. *ib.* & § 24.

Also

(*By whom.*)

Also Felony by same Act, to destroy Letter or advance Rate of Postage and embezzle it. - § 24.

How far varied by Stat. 7 Geo. 3. c. 50. s. 3. *ib.*

Letter-Carriers, &c. or others employed in Post-Office taking or receiving any Letter, &c. and Postage thereof, and destroying Letter, &c. or advancing Rate of Postage on Letters, &c. and not duly accounting for the Money, guilty of Felony by Stat. 7 G. 3. c. 50. s. 3. *ib.*

Stealing Letters, &c. by Persons in general, vide Post.

7. *By Persons employed in Manufactures.* - § 25.

Embezzling, &c. by those employed in Hat, Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, or Silk Manufactures, punished by Fine, Whipping, and Imprisonment, on summary Conviction, by Stat. 17 Geo. 3. c. 56. *ib.*

8. *By Lodgers.* - - - - § 26.

Stealing Furniture, &c. in Lodgings declared Felony by Stat. 3 and 4 W. & M. c. 9. s. 5. *ib.* But not where whole house let, or where Contract with Lodger to make good what is missing. *ib.*

How Indictment to be framed to bring the Case within the Statute. *ib.*

IV. *Of what Things Larceny may be committed.* § 27.

1. Of *Goods personal*, not of the *Realty*, nor affixed thereto. *ib.*

Unless severed by distinct Act at different Time before Removal. *ib.*

Exceptions by Statute.

Stealing, &c. in the Night-time, *Roots*, *Shrubs*, or *Plants*, value 5*s.* growing in inclosed Grounds, Felony and Transportation for 7 Years by Stat. 6 Geo. 3. c. 36. - - - - § 28.

The same Offence in Day-time to any Value punishable by Fine on 1st and 2d Offence before Magistrate: 3d Offence Felony and Transportation for 7 Years by Stat. 6 Geo. 3. c. 48. which being passed in

in the same Session as the former, they must be construed together. - - - § 28.

But stealing, &c. Turnips, Potatoes, &c. subject in all Instances only to Fine and Imprisonment upon summary Conviction, by Stat. 13 Geo. 3. c. 32. *ib.*

ii. The same Statutes of the 6 Geo. 3. with the like Construction apply to the stealing, &c. certain *Timber-Trees*, or other Trees standing for Timber, or likely to become so. - - - § 29.

What Trees are within these acts, and that of 13 Geo. 3. c. 33. *ib.*

iii. Stealing or breaking, &c. with Intent to steal any *Lead*, *Iron Bar*, Grate, Palisadoe, or Iron Rail fixed to Dwelling-house or other Building, or fixed in any Garden, Fence, Outlet, &c. Felony and Transportation for 7 Years by Stat. 4. Geo. 2. c. 32. § 30.

The same Provision extended to any *Copper*, *Brass*, *Bell-metal* Utensil or Fixture, by Stat. 21 Geo. 3. c. 68. *ib.* And also to any Iron Rail or Fencing fixed in any Square, Court, or other Place. *ib.*

And to all Aiders; and to Buyers and Receivers of the same. *ib.*

A Church is a Building within the Stat. 4 Geo. 2. and Lead fixed thereto may be laid to be the Property of the Vicar; but better laid to be "fixed to a certain Building being the Parish Church," &c. § 31.

But Iron Rails fixed to Tomb in Church-yard not within the Act. Nor a Window Casement of Iron, Lead, and Glass, as such.

But stealing Lead from House in Possession of Prisoner under fraudulent Pretence of Lease, within Stat. *ib.*

Stealing to the Value of 10*d.* held within the Acts, and Judgment of Whipping. *ib.*

iv. *Black Lead;* entering with Force the Mines with Intent to steal, or stealing the same there, or assisting or commanding, &c. thereto; Felony, punished by Imprisonment, hard Labour, and public Whipping, or Transportation; returning therefrom before Term, Death. § 32.

Buyers and Receivers guilty of Felony, and punishable as in other Cases. *ib.*

2. *Coals severed*, and Tools for cutting; stealing punishable as Misdemeanor on Conviction, by Stat. 39 & 40 Geo. 3. c. 77. - - - § 33.
3. Larceny cannot be committed of *Charters or other Assurances* concerning the Realty. - § 34.
4. Stealing, &c. *Records*, Felony by Stat. 8 H. 6. c. 12. § 35.
Trial before a peculiar Jurisdiction. *ib.*
To what Courts and Persons the Act extends. *ib.*
Indictment how to be framed. *ib.*
5. Stealing Bonds, Bills, Notes, Exchequer Orders, Dividend-Warrants, &c. Navy Bills or Debentures, &c. Felony, with or without Clergy, as if Offender had stolen or taken by Robbery Goods of like Value with the Money thereby secured by Stat. 2 Geo. 2. c. 25. s. 3. revived by Stat. 9 Geo. 2. c. 18. § 36.
Stealing one Bank Note is within the Act, though in the plural Number. - - § 37.
So stealing Note payable to Order, but not indorsed. *ib.*
Compelling one by Duress to make a Promissory Note on stamped Paper before prepared by Prisoner, and immediately afterwards withdrawn, not within the Stat. *ib.*
Where an expired Statute is revived by another, Indictment laying Offence against *the Statute*, good. *ib.*
Bank Notes cannot be laid as *Chattels;* but this is Surplusage. Nor as Notes *commonly called Bank Notes*, that not being the Description in the Statute. *ib.*
Indictment for Larceny of Bill of Exchange in L. sustained by Evidence that when found on Prisoner there it had Indorsement (made after the Felony) not laid in Indictment. A general Description of the Bill, &c. in the Indictment is sufficient. *ib.*
The stealing of such Securities in the Bank of England by their officers, &c. ante, § 19.
6. *Letters, &c. sent by the Post.* - - § 38.
Stealing or robbing any Mail or Bag of Letters, or any Letter or Packet from any Post-house, &c. Felony without Clergy, by Stat. 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. s. 3.
Embezzlement by Persons empolyed in Post-office; also of what Securities, &c. and in what Manner such stealing may be; ante, § 21, &c.

Obtaining

Obtaining the Mail Bag by Delivery out of the Window of Post-office by pretending to be the Guard, a stealing within the Act. - - - § 39.

Taking Letter out of the Office, with Intent to deliver it to the Owner, and only to embezzle Postage, not a stealing of Letter within St. 7 Geo. 3. c. 50. s. 2. *ib.*

Indictment for stealing Letter from Persons using Firm of *Messrs.* A. B. and C. sustained by Proof that they answered to such Address by others, though they only styled themselves A. B. and C. *ib.*

Indictment for robbing Mail Bag of Letters must be laid in County where Fact happened, and not merely where Prisoner was in possession of Letters. *ib.*

7. *Things where none have determinate Property.* § 40.

Larceny cannot be committed of such; as of Waifs, as such, before Seizure. Qu. How of Wreck. *ib.*

8. *Animals feræ Naturæ.* - - - § 41.

i. No Larceny of such, unless dead, reclaimed, or confined; and so stated in the Indictment. *ib.* Nor of the Eggs of such as are unreclaimed. *ib.*

ii. *Deer.* - - - - - § 42.

Stealing such (being armed and disguised) Felony without Clergy in Principals and Procurers, by Stat. 9 Geo. 1. c. 22. *ib.*

So not surrendering on Proclamation. *ib.*

But stealing in general Red or Fallow Deer in inclosed Places, &c. is Misdemeanor only, punishable with Fine for 1st and 2d Offence; Felony and Transportation for 3d Offence, by Stat. 16 Geo. 3. c. 30. *ib.*

iii. *Fish.* - - - - § 43.

Stealing such out of River or Pond by Persons armed and disguised, a capital Felony by Stat. 9 Geo. 1. c. 22. *ib.*

What a sufficient reclaiming to make them the Subject of Larceny at common Law. *ib.*

Stat. 22 & 23 Car. 2. c. 25. s. 7. gives treble Damages and 10*s.* to the Poor against Offender for stealing Fish out of Ponds, &c. and other several Waters and Rivers without Consent of Owner. *ib.*

But by Stat. 5 Geo. 3. c. 14. s. 1. stealing Fish in any Stream or Water in Park, &c. inclosed, or Garden, &c.

&c. adjoining Dwelling-house, without Owner's Consent; or aiding therein, or receiving or buying them knowingly; Transportation. - § 43.

Such stealing, &c. (not being in such Park, Garden, &c.) but in any other inclosed Ground, creates Forfeiture of 5*l.* *ib.*

In Indictment on Stat. Geo. 3. for stealing Fish out of Pond, stating them to be "Goods and Chattels;" those words held Surplusage. *ib.*

Qu. If Indictment at common Law must describe what Kind of Pond, &c. *ib.*

iv. *Conies and Hares.* - - - § 44.

Stealing, &c. Conies in Grounds inclosed for that Purpose before the Act, Misdemeanor, Imprisonment and Penalty, and finding Sureties, by Stat. 3 Jac. 1. c. 13. Extends not to Hunting, &c. in Day-time. *ib.*

Stat. 22 & 23 Car. 2. c. 25. extends to Ground lawfully used for Conies whether inclosed or not, but confines Punishment to Conviction before Justice of Peace. *ib.*

By Stat. 5 Geo. 3. c. 14. such Offenders in the Night-time subjected to Transportation or other less Punishment by Whipping, Fine, or Imprisonment. *ib.*

By Stat. 9 Geo. 1. c. 22. robbing Warrens or Places where Hares or Conies are usually kept, by Persons armed and disguised, or rescuing such Offenders, or procuring others to join therein, Felony without Clergy. *ib.*

Result of several Statutes. *ib.*

9. *Animals of base Nature.* - - § 45.

As Foxes, Cats, &c. not Subjects of Larceny. *ib.*

But stealing Dogs punishable upon summary Conviction by Stat. 10 Geo. 3. c. 18. *ib.*

10. *Domestic Animals.* - - - § 46.

i. Fit for Food, are Subjects of Larceny. So of their Eggs and Young. *ib.*

ii. *Horse stealing.* - - - § 47.

Felony without Clergy, by Stat. 1 Ed. 6. c. 12. and 2 & 3 Ed. 6. c. 23. and 31 Eliz. c. 12. which latter also ousts Accessaries before and after:

But not the Receivers of stolen Horses, though made Accessaries after, by Stat. 3 & 4 W. & M. c. 9. *ib.*

iii. Stealing

iii. Stealing *Sheep and other Cattle.* - § 48.
(i. e. by Stat. 15 Geo. 2. c. 34. Bulls, Cows, Oxen, Sheep, Steers, Bullocks, Heifers, Calves, and Lambs,) Felony without Clergy by Stat. 14 Geo. 2. c. 6.
Indictment for stealing Cow not proved by shewing it a Heifer. *ib.*
Indictment for stealing Lambs proved by shewing the Skins taken away, though Carcases left. *ib.*
Indictment charging Principal for stealing live Sheep, and Accessary for receiving Mutton, Part of Goods, &c. so as aforesaid feloniously stolen, &c. good. *ib.*
iv. The *Products* of such Animals Subjects of Larceny, as Milk, Wool, &c. - - - § 49.
11. *Manufactories.* - - - § 50.
i. A breaking into *Plate Glass* Manufactory, and stealing Goods, Felony and Transportation, or less Punishment as Court think fit. *ib.*
ii. *Woollen Cloth.* - - - § 51.
Stealing from the Rack or Tenters in the Night, Felony without Clergy; but Court may mitigate to Transportation by Stat. 22 Car. 2. c. 5. *ib.*
Extends not to Accessaries. *ib.*
Refusing to be transported, or returning before Period, Execution on former Judgment. *ib.*
But by Stat. 15 Geo. 2. c. 27. Magistrate may issue Search Warrant to search suspected Places, and if on finding such Goods Party give not satisfactory Account, he shall be deemed to have stolen them, and forfeit treble Value; for 3d Offence Felony and Transportation: but this not to alter former Law. *ib.*
iii. *Linen, Cotton, &c.* - - - § 52.
Stealing such by Day or Night, exposed to be printed, bleached, dried, &c. in Grounds, Houses, &c. used by the several Manufacturers; or assisting, &c. or procuring, &c.; or buying or receiving such stolen Goods knowingly, &c. Felony without Clergy; but Court may sentence to Transportation. Stat. 18 Geo. 2. c. 27. *ib.*
Breaking Gaol, or returning from Transportation, Death. *ib.*

Breaking into Houses, &c. with Intent to steal such, Felony without Clergy by Stat. 4 Geo. 3. c. 37. § 52.
12. *Naval and Ordnance Stores, &c.* - § 53.
Embezzling the same by Persons having Charge or Custody of them to Value of 20*s.* Felony, by Stat. 31 Eliz. c. 4. *ib.*
Ousted of Clergy by Stat. 22 Car. 2. c. 5. with Power in the Court to reprieve and transport. *ib.*
Extends not to Accessaries or Appeals. *ib.*
Semble Felony at Common Law in Persons having Charge of such Stores to steal them, though under 20*s.* Value. *ib.*
Vid. Post. Receivers.
Things stolen by Servants, Lodgers, and others under particular Prohibitions, considered ante, (§ 26.)
Things under peculiar Sanction on account of the particular Places from whence taken. Post.

V. *As to the Place from whence taken.* - § 54.
Larceny from the House, &c. - § 55.
In what Cases Clergy ousted. - § 56.
1. Where Larceny is above the Value of 12*d.*
2. Where to the Value of 5*s.*
3. Where to the Value of 40*s.* *ib.*
The several Statutes in order of Time. § 57.
By Stat. 23 H. 8. c. 1. s. 3. and 25 H. 8. c. 3. robbing Churches, &c. or robbing Persons in Dwelling-houses, the Owner, his Wife, Children, or Servants being therein, and put in Fear, Felony without Clergy. Qu. if repealed as to Clergy. *ib.*
By Stat. 1 Ed. 6. c. 12. s. 10. - - § 58.
Breaking House by Day or Night, any Person being therein and put in Dread; or robbing any Person in or near Highway; or stealing in any Church or Chapel; Felony without Clergy. *ib.*
Housebreaking within the Act must be attended with Felony. *ib.*
By Stat. 5 & 6 Ed. 6. c. 10. - - § 59.

Persons

Persons convicted of Larceny in one County where Goods taken by Robbery or Burglary in another, ousted of Clergy. - - - § 59.

By Stat. 5 & 6 Ed. 6. c. 9. - - § 60.

Robbing Persons in Dwelling-houses, the Owner, his Wife, Children, or Servants being therein, or in any other Place within the Precincts of the same, whether waking or sleeping, ousted of Clergy. *ib.*

The like as to robbing any Person in a Booth or Tent in a Fair or Market. *ib.*

By Stat. 4 & 5 Ph. & M. c. 4. - - § 61.

Accessaries before to Robbery in any Place ousted of Clergy, i. e. Robberies of such Kind as were before excluded of Clergy in case of Principals. *ib.*

By Stat. 39 Eliz. c. 15. - - § 62.

Felonious taking away in the Day-time of Money, Goods or Chattels from any House to the Value of 5*s*., though no person be within, ousted of Clergy. *ib.*

By Stat. 3 W. & M. c. 9. s. 2. - § 63.

Persons ousted of Clergy by prior Stat. on Conviction, also ousted on standing Mute, &c. *ib.*

By the same Stat. s. 1. - - § 64.

Feloniously taking Goods in Dwelling-house, any Person therein and put in fear; or robbing Dwelling-house, in Day-time, any Person therein: or abetting or counselling, &c. thereto; or to break Dwelling-house, Shop, or Warehouse belonging to or therewith used, in Day-time, and stealing Money, Goods, &c. of 5*s*. Value, though no Person within, are ousted of Clergy. *ib.*

By Stat. 10 & 11 W. 3. c. 23. - § 65.

Privately stealing Goods, Wares, or Merchandizes of 5*s*. Value in Shop, Warehouse, Coach-house, or Stable, though not broken, nor any Person therein; and Assisters, Commanders, &c. ousted of Clergy. *ib.*

By Stat. 12 Ann. st. 1. c. 7. - - § 66.

Stealing Money, Goods, Wares, &c. of 40*s*. Value in Dwelling-house or Outhouse, though not broken, and whether any Person therein or not, and Aiders, &c. ousted of Clergy. *ib.*

Not

Ch. XVI. § 76. *In houses, &c.*

converse will not hold equally general. And therefore in the case of breaking any out-house, (not being part of the dwelling-house,) other than a shop or warehouse, and stealing thereout under the circumstances described in the stat. 39 Eliz. it does not appear that the accessary before is expressly ousted by any statute; and if not, neither is the aider or abettor, according to the construction put upon that statute, unless he actually enter the house. Though at any rate, if the value of the goods stolen amount to 40*s.* then aiders and assisters are ousted of clergy by stat. 12 Ann. c. 7. But it will follow from the reasoning upon Powlter's case before alluded to, that the statute of William, having ousted of his clergy the accessary before to such a felony committed in a shop or warehouse, must be taken to have ousted the principal also under the like circumstances. And the case of privately stealing in houses is provided for by stat. 10 & 11 W. 3. c. 23. which I shall shortly describe.

2 Hawk. ch. 33. s. 100, 101.
Supra.
1 Hale, 565. n.
Ante, s. 68. 73.

§ 77. *Indictment.*

The indictment must precisely pursue the words of the statute 39 Eliz. By the words, "although no person shall be "in the said house or out-houses at the time of such felony "committed," must be understood that no person was within at the time; and it must be so laid in the indictment and proved in evidence. And if it appear that the felony were committed in the night, so as to make it burglary; or when some of the family were in the house, in which case the offender might have been ousted of clergy by the stat. 5 & 6 Ed. 6. c. 9. if the indictment had been framed on that statute; the Defendant can only be convicted of simple larceny, and shall not lose the benefit of clergy.

1 Hale, 525. b.

§ 78. *Larceny of 5s. in shop, &c. though not broken, and though no person within.* 10 & 11 W. 3. c. 23.

7. *Privately stealing Goods, Wares, and Merchandizes to the Value of 5s. in a Shop, Warehouse, Coach-house, or Stable, by Day or Night, though not broken, and though no Person be within at the Time.*

In these offences the stat. 10 & 11 W. 3. c. 23. excludes from clergy the principals, assisters, hirers, and commanders; being thereof convicted or attainted by verdict or confession, or being indicted and standing mute, or challenging above twenty.

This

This statute is defective in not mentioning persons outlawed; nor, as Hawkins says, accessaries: but the latter assertion is too general as to accessaries before; for the statute extends to such as *hire* or *command* the offence to be committed. And Lord Coke, and after him Mr. Justice Foster, consider the word *command* as comprehending all those who incite, procure, set on, or stir up any other to do the fact.

Ch. XVI. § 78. *In shops, warehouses, coachhouses, &c.*

2 Hawk. ch. 33. s. 65. 68. 1 Hale, 565. n. Fost. 126. Ante, 629.

The words of the statute are, "privately and feloniously "steal, &c.;" and therefore if the shop, &c. be broken, or any force used, it is not within the act. It was so ruled by Trevor, Powis, and Blencow, in the case of Tims and Cecil, O. B. 5th December 1711, and in Rex v. Cartwright, O. B. 1726. But the stat. 3 & 4 W. & M. c. 9. s. 1. extends to breaking. In Thomas Jones' case, who was indicted on this statute for privately stealing goods out of a shop; it appeared that the shop was detached at a considerable distance from the dwelling-house; that it was left safely locked on the Saturday night, about 12 o'clock, and on the Monday morning following it was discovered that the shop had been entered, (as supposed, by a false key or pick-lock,) and the goods stolen to the value of above 700*l.* There were two locks on the outward door of the shop, next the street, both of which were found unlocked on the Monday morning; but the door was shut, one of the locks being a spring-lock. No violence appeared to have been used in gaining admittance, but a desk in the counting-house was wrenched open and the lock broken. The prisoner was capitally convicted: but it was objected on his behalf, that force having been used by breaking the lock and wrenching the desk open, the offence was not that of *privately* stealing; and that the prisoner could not be convicted on this indictment. The jury found him guilty. But in Easter term 1787 all the Judges held the conviction wrong as to the capital part of the charge, there having been force used (*a*). But as the prisoner ought to have been convicted of the simple

§ 79. *Construction of* 10 & 11 W. 3. c. 23. *No force.* 2 MS. Sum. 277. 534. MS. Burnet, 79. Fost. 79. Jones's case, Lancaster Lent Ass. 1787, MS. Jud. MS. Buller J. & 2 MS. Sum. 277, 8.

(*a*) According to the MS. of Buller J. the opening the door with a pick-lock was a force sufficient to take the case out of the statute.

Ch. XVI. § 79. *In shops, warehouses, coachhouses, &c.*

felony upon this record, he was recommended for a pardon on condition of transportation.

This agrees with Mr. Justice Foster's description of the offence under this statute; which, he says, seems to exclude all cases where *any degree of force* is used *to come at the goods.* But where it did not appear whether any force had been used or not, the case was adjudged to be within the statute by Parker C. J. and Tracy J. and the same resolution was made in a subsequent case.

Fost. 79.

R. v. Matthews, O. B. 5th April 1715.

R. v. Corder, O. B. 6th Dec. 1721, Serjt. Foster's MS.

§ 80. *Extends only to the owner's goods.* 2 MS. Sum. 534. Howard's case, 1751, O. B. Fost. 78, 9. infra.

The stat. 10 & 11 W. 3. also says "though the owner or "any other person be not in such shop," &c. If, therefore, the goods of a stranger only be stolen, it is not within this act: for this law was intended as a security for shop-keepers and traders in the better protection of their goods. And upon the same principle, it has always been holden, that the goods stolen must be such as are usually sold or exposed to sale in such shop; and not any other valuable thing which may happen to be put there: for it was the object of the statute to secure such repositories for their proper purposes. And therefore a shirt left in a mercer's shop to be sent to wash was holden not to be within the act.

Kept in their appropriate places. Post. s. 85.

Vide S. C. 8 Mod. 165. O. B. April, 9 Geo. 1.

Howard's case,* O. B. 1751, cor. Ld. C. B. Parker, Foster and Birch Js. Fost. 77. (*Vide* Godfrey's case, O. B. Dec. 1783, Sess. Pap. No. 20. and 1 Leach, 322. et Qu.)

The words of the statute are "shop, warehouse," &c. John Howard was indicted on the statute for privately stealing goods the property of Fludyer and Co. in the warehouse of J. Day. Another count charged the prisoner with stealing the goods of J. D. in his warehouse. It appeared that Day kept a common warehouse by the water side, where merchants usually lodged goods intended for exportation, until they could ship them. Fludyer and Co. sent these goods to the warehouse for that purpose, from whence they were stolen by the prisoner. The court held that the case was not within the statute; for by the word *warehouses* were meant, not mere repositories for goods, but such places where merchants and traders kept their goods for sale in the nature

* *Vide* Barrington on the stat. 487. observing, in contradiction to this case, that such warehouses, at a distance from the dwelling-house, were particularly meant to be protected by the stat. 10 & 11 W. 3. c. 23. and vide preface to 2d edition of Foster's C. L. xvi.

of

of shops, and whither customers went to view them. And though there the goods might properly enough be laid to be the property of Day, since he had the charge of them, and was accountable for them to his principals; yet the warehouse was not a place for sale, but merely for safe custody. Accordingly the prisoner was found guilty of the simple larceny only, and acquitted of the stealing privately in the warehouse.

Stone was indicted for privately stealing a watch, the property of Sir Robert Hesketh, in the shop of one Alcock. The prosecutor had sent it to his watch-maker to be repaired, and it hung in the show glass in the shop, from whence it was taken: yet not being there for sale, the prisoner could not be convicted under the statute. R. v. Stone, O. B. 1784, 1 Leach, 375. Fost. 78.

It has also been rightly holden that *money* is not within the act with regard to any of the places mentioned in it; the words being "*goods, wares, and merchandizes.*" For though the word "*goods*" may, and often does, in a large sense include money; yet being connected with *wares and merchandizes*, the safer construction, in so penal a statute, will be to confine it to goods ejusdem generis, namely, goods exposed to sale. But the stat. 12 Ann. st. 1. c. 7. extends expressly to money. *Money.* Fost. 79. 2 MS. Sum. 277. Herbert's case, O. B. 1720, by Powell, Dormer, and Richardson, Js. and Ward's case, ad idem. Ante, 629.

The same construction takes place with respect to coach-houses and stables: the goods must be such as are usually lodged in such places. For the legislature, in giving so high a protection to those particular repositories, intended it only for the proper and usual contents of them. In John Sea's case, the court doubted whether a livery great coat belonging to a coachman, which he had hung up in the stables whilst he went into the house to receive his wages, could be considered as any part of the proper or usual furniture of the stable out of which it was stolen: and therefore directed the prisoner to be acquitted of the capital part of the charge. *Coach-houses and stables.* 2 MS. Sum. 277. 534. Fost. 78. Post. s. 85. Sea's case, O. B. 1785, Leach, 248. (last edit. 341.)

Ch. XVI. § 81. *In dwelling-houses and out-houses to 40s. value.*

8. *Larceny in a Dwelling-house or Out-house thereto belonging of Money, Goods, Wares, &c. to the Value of 40s. though the house be not broken, and whether any person be within or not.*

§ 81. *Larceny in dwelling-house, &c. to 40s. value.* 12 Ann. st. 1. c. 7. ante, 629.

Clergy is therein taken away by the stat. 12 Ann. st. 1. c. 7. from the principals, assisters, and aiders on conviction, or attainder by verdict or confession; or on being indicted and standing mute, or not directly answering, or peremptorily challenging above 20. But apprentices under the age of 16, robbing their masters, are excepted out of the act. And neither principals outlawed, nor accessaries before, are included in it.

2 Hawk. ch. 33. s. 65. 68.

What offenders within it. 2 MS. Sum. 274. Rex v. Mary Macdaniel and Eliz. Thompson, O.B. Sept. 1784, cor. Eyre B. (*Vide* 1 Leach, 379. S. C. and Sess. Pap. No. 922. (*a*).) (*b*) Ann Gould's case, O. B. Jan. 12th, 1780, cor. Nares J. (Lord C. B. Skynner, and Ashhurst J. present and concurring), MS. Jud. (S. C. 1 Leach, 257.) Ante, 561.

The statute has been holden not to extend to a stealing by a man in his own house; for the intention of the act was to protect the owner's property in his own house from the depredation of others, or the property of others lodged in the owner's house; thereby giving protection against all but the owner himself. The same point was ruled by Nares J. in another case (*b*), where the mistress of a brothel stole money from a sailor who lodged in her husband's house: because the statute extends only to the dwelling-house of another; and this being the house of her husband was the same as her own. And this case was afterwards approved of by Skynner C. B. Ashhurst, Gould, and Heath Justices. But the statute expressly extends to servants, as appears by the preamble.

Dalt. ch. 58. R. v. Davis, alias Silk, ante, 499.

The dwelling-house must be such wherein burglary may be committed, and not that which is only inhabited casually or for a special purpose.

§ 82. *What a stealing from the house within the statute.* Ante, s. 80. Campbell's case, O. B. Jan. 1792, cor. Ld. C. B. Eyre, Buller and Wilson Js. 2 Leach, 642.

It has also been holden, that in order to bring a case within the stat. 12 Ann. the property stolen must be such as is usually under the protection of the house.

The prisoner was indicted upon the stat. 12 Ann. c. 7. for stealing in the dwelling-house of C. M. Adams, a bank note of 25*l.* It appeared that the prisoner lodged at Mrs.

(*a*) The accomplice, tried at the same time with the mistress of the house, was directed to be acquitted of the capital part of the charge.

Adams'

Adams' house, and that she, having occasion to change the note in question, sent her servant with it to the prisoner with that request. The prisoner, after examining his purse, said, he had not money enough by him for the purpose, but he would go immediately to his banker's and get it changed; and accordingly he left the house with the bank note, and never returned. A question arose at the trial, Whether the case were within the statute, which was made to protect property deposited in the house, and not that which was about the person of the party. After conviction the case was reserved for the opinion of the Judges, who thought it was not a capital offence within the statute.

Ch. XVI. § 82. *In dwelling-houses and out-houses to 40s. value.*

Edward Owen was indicted for stealing 105 guineas, the property of James Foreman, in the dwelling-house of Patrick Brady. Brady kept a public house in Holborn, into which Foreman was seduced by the prisoner, under pretence of dividing the value of a cross which the prisoner picked up and pretended to have found in the street; and there the prisoner obtained the 105 guineas from the prosecutor, under exactly the same circumstances as have been repeatedly given in evidence in the ring-dropping cases. But it was objected that the case did not fall within the stat. of Ann. because the prosecutor was neither the owner nor a settled inhabitant of the house in which the money was taken. It was further insisted, that this case must be taken as if the property of the prosecutor had been stolen out of his pocket, or otherwise from his person, without any deceit; and that the statute was meant to protect property usually kept or deposited in the house, as contradistinguished from property under the protection of the person: and Campbell's case was mentioned and insisted upon as an authority in point. On a conference of the Judges in Michaelmas term 1792, a majority of them were of opinion that this case was not within the statute: for that to bring a case within it, the property must be under the protection of the house, deposited there for safe custody; as part of the furniture or money, plate, &c. kept in the house, and not things immediately under the eye or personal care of some one who happened to be in the house. The same point was again ruled in a similar case of Rex v. Castledine, which was also referred to the Judges: where

Rex v. Owen, O. B. 1792, MS. Buller J. and MS. Jud. *The larceny must be of things under the protection of the house, and not of any person in it; therefore not of money out of his pocket.*

Supra.

John Castledine's case, O.B. Oct. 1792, MS. Buller J.

under

Ch. XVI. § 82. *In dwelling-houses and out-houses to 40s. value.*

under a like pretence, the prosecutor, who had been decoyed into a public house, was prevailed upon to produce his watch and 5 guineas, which he laid upon the table, but without any agreement that the prisoner should have them; who, nevertheless, took them up and went off with them without the prosecutor's consent.

Post. s. 107.

The same was again ruled in Watson's case in 1794.

§ 83. *Bank notes within the statute.* Dean's case, O. B. July 1795, MS. Buller J. Sess. Pap. for May 1796, p. 615. (S. C. 2 Leach, 798.) Milnes' case, ante, s. 37. Watson's case, post. s. 107. Post. s. 120. Ante, s. 36.

The stealing of bank notes is within the act. This was ruled by all the Judges in Dean's case in Easter term 1796. The same point seems to have been taken for granted in Milnes' case, and in Watson's case, and the like resolution has been made in the case of an indictment upon the stat. 8 Eliz. c. 4. for privately stealing from the person. These determinations were founded on the consideration of the stat. 2 Geo. 2. c. 25. whereby the stealing of such securities is put on the same foot as the stealing of goods of the like value with the money secured by the same.

§ 84. *Result of the statutes as to clergy.*

Upon the whole it may be collected, that the ousting of clergy in the above-mentioned statutes concerning larcenies and robberies in houses depends on one or more of these circumstances; either where there is a breaking of the house; or a putting in fear of the persons within it; or the goods stolen therein amount to a certain value, under certain modifications. A breaking is necessary under the stats. 1 Ed. 6. c. 12. s. 10. 5 & 6 Ed. 6. c. 9. 39 Eliz. c. 15. s. 2. and 3 & 4 W. & M. c. 9. s. 1. as a putting in fear is under the same stats. 1 Ed. 6. c. 12. s. 10. and 3 & 4 W. & M. c. 9. s. 1. and 23 H. 8. c. 1. s. 3. and the value is also made material by 39 Eliz. c. 15. s. 1. and the 3 & 4 W. & M. c. 9. s. 1. before mentioned, and also by 10 & 11 W. 3. c. 23. and 12 Ann. st. 1. c. 7.

In Ships, &c.

§ 85. *In ships, &c.* 24 Geo. 2. c. 45.

By the stat. 24 Geo. 2. c. 45. "All and every person and "persons who shall feloniously steal any goods, wares, or "merchandize of the value of 40*s.* in any ship, barge, "lighter, boat, or other vessel or craft, upon any navigable "river,

" river, or in any port of entry or discharge, or in any " creek belonging to such river or port, or upon any wharf " or quay adjacent to such river or port; or who shall be " present, aiding, and assisting in committing any such of- " offences, being thereof convicted or attainted, or being " indicted shall stand mute, not directly answer, &c. or " peremptorily challenge above 20, &c. shall be excluded " from the benefit of clergy."

Ch. XVI. § 85. *In ships, &c. on navigable rivers.*

Upon this statute the construction is generally confined to such goods and merchandizes as are usually lodged in ships, or on wharfs or quays. And therefore where George Grimes was indicted on this statute for stealing a considerable sum of money out of a ship in port; though great part of it consisted of Portugal money, not made current by proclamation, but commonly current; it was ruled not to be within the statute.

2 MS. Sum. 534. Ante, s. 80. R. v. Grimes, Maidstone Lent Ass. 1752, Fost. 79. S. P. Leigh's case, O. B. 1764, 1 Leach, 62.

At the Old Bailey in May 1784, one Pike was tried before Adair Serjt. Recorder, on the stat. 24 Geo. 2. c. 45. for stealing a quantity of deals " in a certain barge on *the navigable river* Thames." It appeared in evidence, that as the barge with the deals, belonging to the prosecutor, was navigating down the *Thames*, the lighterman, fearful of an accident, brought it into Limehouse dock, where it was moored. By the efflux of the tide it was left aground, and in the night the boat and the deals, above the value of 40*s*. were stolen. The court held that the offence laid was not proved within the meaning of the statute. That in the construction of statutes, which took away the benefit of clergy, the law required that the fact laid in the indictment should be strictly proved: but in the present case, the evidence proved that the larceny was not committed *on the navigable river* Thames, but upon *the banks* of one of its *creeks*. That it was true, the statute also took away the benefit of clergy from any person who should steal to the amount of 40*s*. " in any port of entry or discharge, or in any *creek* " belonging to any navigable river, port of entry or dis- " charge:" but this being a different branch of the act, the indictment should have charged the fact accordingly. The prisoner therefore was only convicted of the simple larceny.

Pike's case, O. B. 1784, 1 Leach, 357. Sess. Pap. No. 625. *Indictment for stealing deals in a barge on the Thames not proved by shewing that the barge was aground in a dock in a creek of the river; to which another description in the statute applies.*

So

Ch. XVI. § 86. *In ships in distress.*

§ 86. *In ships in distress.* 26 Geo. 2. c. 19. s. 1. *Vide* tit. Malicious Mischief for further provisions of this act.

So the plundering, stealing, or destroying "of any goods "or merchandizes, or other effects, from or belonging to "any ship or vessel of his majesty's subjects or others, which "shall be in distress, or which shall be wrecked, lost, "stranded, or cast on shore, in any part of his majesty's "dominions, whether any living creature be on board or "not (*a*), or any of the furniture, tackle, apparel, provision, "or part of such ship," &c. is excluded clergy by stat. 26 Geo. 2. c. 19.

12 Ann. st. 2. c. 18. s. 5. made perpetual by 4 G. 1. c. 12.

A similar provision was before made by the stat. 12 Ann. st. 2. c. 18. made perpetual by stat. 4 Geo. 1. c. 12. whereby whoever shall "steal any pump belonging to a ship in "distress, or shall be aiding or abetting thereto," is excluded clergy.

26 Geo. 2. c. 19. s. 2.

By s. 2. of the stat. 26 Geo. 2. c. 19. "when goods or "effects of small value shall be stranded, lost, or cast on "shore, and shall be stolen without circumstances of cruelty, "outrage, or violence, it shall be lawful to prosecute for "such offence by way of indictment for petit larceny; and "the offender, on conviction, shall suffer such punishment "as the laws in case of petit larceny do enjoin or require."

Ante, s. 80. 85.

There does not seem to be the same reason for limiting the operation of the words "*any goods, &c. or other effects,*" in this statute, in the same manner as in some other statutes before mentioned; not only because the word *effects* is of much more comprehensive signification than the words "*wares or* "*merchandizes,*" used in those statutes; but because the mischief extends equally to every species of property, which can fall under these general words.

Offering shipwrecked goods for sale. Sect. 4. Post. as to receivers.

By s. 4. of the same act "If any person or persons shall "offer or expose to sale any goods or effects whatsoever, "belonging to any ship or vessel lost, stranded, or cast on "shore, as aforesaid, and unlawfully taken away, or rea"sonably suspected so to have been; it shall be lawful for "the person to whom the same shall be so offered for sale, "or any officer of the customs or excise, or any constable, "&c. or other peace-officer, to stop, take, and seize the "said goods and effects, and with all convenient speed

(*a*) This provision was with reference to the stat. 3 Ed. 1. c. 4. by which the vessel was not to be adjudged wreck if any thing escaped alive.

carry

" carry the same, or give notice of such seizure to a justice " of peace: and if the person or persons who shall have " offered the same for sale, or some other on their behalf, " shall not appear before the said justice within ten days " next after such seizure, and make out to his satisfaction " the property of the said goods, &c. to be in them or those " by whom they were employed to sell the same; then the " said goods, &c. shall by order of the said justice be forth- " with delivered to the use of the owner on payment of a " reasonable reward, (to be fixed by the justice,) to the per- " son seizing: and such justice shall and may commit the " person or persons who have so offered or exposed the same " to sale to the common gaol for six months, or until he " shall have paid the owner, or any lawfully authorized to " receive it, treble the value of such goods," &c. Ch. XVI. § 86. *In ships in distress.*

By s. 8. of the same act, " If oath shall be made before " any magistrate, lawfully empowered to take the same, of " any such plunder or theft, and the examination in writing " thereupon taken shall be delivered to the clerk of the " peace of the county, riding, or division, wherein such " fact shall be committed, or to his deputy; or if oath shall " be made before any such magistrate of the breaking any " such ship, contrary to the aforesaid act made in the 12th of " Queen Anne, and the examination in writing thereupon " taken shall be delivered to such clerk of the peace, or his " deputy; then such clerk of the peace shall cause the of- " fender or offenders in any of the said cases to be forth- " with prosecuted for the same, either in the county where " the fact shall be committed, or in any county next adjoin- " ing; in which adjoining county any indictment may be " laid by any other prosecutor. And if the fact be com- " mitted in Wales, then the prosecution shall or may be " carried on in the next adjoining English county. And the " necessary charges of such prosecutions by the clerk of the " peace shall be paid by the treasurer of the county, &c. " where the fact shall be committed, to such amount as the " justices of the peace shall order. And if such clerk of " the peace shall neglect or refuse to carry on such prose- " cution in due manner, he shall forfeit 100*l.* for every such " offence to any person or persons who shall sue for the " same," &c. 26 G. 2. c. 19. s. 8. *Where prosecution by clerk of peace, or in another county.* *Vide* post. s. 156.

Ch. XVI. § 87.
In Northern counties.

In Northern Counties.

§ 87.
In Northern counties.
43 Eliz. c. 13.
Vide ante, p. 430. the preamble, for, &c.

The stat. 43 Eliz. c. 13. levelled against such as are guilty of personal violence and rapine, in the northern counties of Cumberland, Northumberland, Westmoreland, and the Bishoprick of Durham, which has been before adverted to; reciting that persons had been carried from them into other counties as prisoners, and kept barbarously and cruelly, until they were redeemed by great ransoms; and also that of late there had been many incursions, robberies, and burning and spoiling of towns, villages, and houses within the said counties, so that divers subjects there had been forced to pay a certain rate of money, corn, cattle, or other consideration, commonly called *Black Mail*, to divers persons inhabiting upon or near the borders, &c. in alliance with great robbers and spoilers in those parts, &c. enacts, that whoever shall so take away, detain, force, or imprison, any persons within the same counties, or against their wills, to ransom them, or make spoil of their goods, &c. "or whoever "shall take, receive, or carry to the use of himself, or wittingly to the use of any other, any money, corn, cattle, or "other consideration, commonly called Black Mail, for the "protecting or defending of him or them, (i. e. the true men) "their lands, goods or chattels from such thefts, spoils, and "robberies as aforesaid, and shall be indicted and lawfully "convicted of any the said offences, or stand mute, or challenge peremptorily above 20, before the justices of assize, "gaol delivery, oyer and terminer, or justices of the peace "within any of the said counties, shall be adjudged felons "without benefit of clergy."

Vide 6 Geo. 2. c. 37. s. 9, 10. regulations in aid of this act, and 13 & 14 Car. 2. c. 22. made perpetual by 31 G. 2. c. 42.

(*Vide* post. tit. Malicious Mischief for other offences therein mentioned.)

18 Car. 2. c. 3. continued by 6 Geo. 2. c. 37. made perpetual by 31 Geo. 2. c. 42.

The benefit of clergy is taken away "from great, known, "and notorious thieves and spoil-takers, both in Cumberland and Northumberland, on conviction, for theft done "within the same:" or otherwise the justices of assize, oyer and terminer, or gaol delivery, before whom they are convicted, may transport them for life.

§ 88.
In whom the property.
Ante, s. 40.

6. *To whom the Property stolen shall be charged to belong.*

It has been already shewn, that some things are not the subjects of property at all, or only so ratione loci or privilegii,

legii, and that others are only such sub modo, that is where some person has acquired a special dominion over them. But with respect to things which are the regular subjects of property, felony may be committed in stealing them, though the owner be not known; for the guilt of the thief is the same. And he may be charged in the indictment with having stolen the goods of a person to the jurors unknown; or with having received goods stolen by a person unknown. And in such case the king shall have the goods. But if the owner be really known, an indictment alleging the goods to be the property of a person unknown, would be improper: in that case the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. And in prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious or *invito domino;* for it is not enough that the prisoner is unable to give a good account how he came by the goods.

Ch. XVI. § 88.
Goods of person unknown.
Goods of person unknown.
2 MS. Sum. 250.
1 Hawk. ch. 33. s. 29.
1 Hale, 512.
2 Hale, 181. 290.
Staundf. 95. b.
4 Blac. Com. 235.
Post. tit. Receivers.
Rex v. Thomas, post. s. 163.
Post. 657.

This seems to be the true ground upon which persons indicted for stealing any goods in themselves the subject of property, but whereof no owner can be found, are in any instance, (the fact of taking, &c. *lucri causâ* being proved,) entitled to an acquittal. For the true owner by losing them does not lose the property in them until seizure by some other person having a right to seize in such cases. And as the form of the indictment, laying them to be the property of a person unknown, is good, the only difficulty lies in proving that the taking was felonious, or *invito domino.*

§ 89.

He who steals the bells or other goods of a chapel in time of vacation, may be indicted for stealing the goods of the chapel, being in the custody of such and such; or in the case of a parish church, they may be laid to be the goods of the parishioners. But in an indictment on the stat. 4 Geo. 2. c. 32. for stealing lead from Hendon church, it was holden not necessary to lay the property in any person, though it might be laid to be the property of the vicar. But that case turned on the particular nature of the property protected by the statute.

Goods of a church.
1 Hawk. ch. 33. s. 29.
1 Hale, 512.
Ante, s. 31.
Wats. Clér. Law, 391.

There

Ch. XVI. § 89. *Goods of a church.*

Corpse, &c. Haynes's case, 12 Co. 113. 4 Blac. Com. 235*. Rex v. Lynn, 2 Term Rep. 733. MS. Tracy, 67. M. 23 Geo. 2. 3 Inst. 110. 1 Hale, 515.

(*a*) Serjt. Forster's MS.

Ante, s. 88.

1 Hale, 514.

There can be no property in a dead corpse; and therefore stealing it is no felony, but a very high misdemeanor. In the case of Dr. Handyside, where trover was brought against him for two children that grew together; Lord C. J. Willes held the action would not lie, as no person had any property in corpses. But a shroud stolen from the corpse must be laid to be the property of the executors, or whoever else buried the deceased, and not of the deceased himself. Some years since several persons were convicted and transported for stealing leaden coffins out of the vaults in St. Andrew's, Holborn, and they were laid to be the goods of the executors (*a*). But if it do not readily appear who is the personal representative of the deceased, laying it to be the goods of a person unknown is sufficient. Thus at Exeter Lent assizes 1794 a man was tried before Buller J. for stealing a leaden coffin, the property of a person unknown; and in another count it was laid to be the property of certain persons, being the then church wardens. The latter, it was at once decided, could not be supported: and to the former it was objected, that though the coffin had lain in the ground near 60 years, yet the same family, of which the deceased had been a member, remained on the spot: and it did not even appear that any inquiry whatever had been made to ascertain the fact; which shewed a want of reasonable diligence in the prosecutor: but it was ruled to be sufficient after so many years had passed. Again, if the goods of any intestate be stolen before administration, they shall be supposed to be the goods of the ordinary: or if an executor be appointed, the goods shall be said to be his before probate: and they need not shew their title specially as ordinary or executor, because it is founded on their own possession.

§ 90. *Special property or possession.* 2 MS. Sum. 249. 1 Hale, 513. 1 Hawk. ch. 33. s. 30. Kel. 39. 45. Burnet's MS. Sum. 67.

Any one who has a special property in goods stolen may lay them to be his in an appeal or indictment for larceny; as a bailee, pawnee, lessee for years, carrier, or the like; a fortiori, they may be laid to be the property of the respective owners; and the indictment is good either way. But if it appear in evidence, that the party whose goods they are laid to be had neither the property nor the possession, [and for this

Ch. XVI. § 90. *Goods of intestate, &c.*

this purpose the possession of a feme covert or servant is, generally speaking, the possession of the husband or master,] the prisoner ought to be acquitted on that indictment. The same rule prevails in the case of goods belonging to a guest (*a*), stolen at an inn; they may be laid to be the property either of the innkeeper or the guest. So, goods stolen from a washerwoman (*b*), who takes in the linen of other persons to wash, may be laid to be her goods; by Parker C. J., Tracy and Bury Js.; for persons of this description have a possessory property, and are answerable to their employers; and could all maintain an appeal of robbery or larceny, and have restitution. So an agister has a possession and property against all but the right owner. Parker, Bury B. and Tracy J.

Keilw. 90. b. pl. 7. Moor, 248. Staundf. 28. b.

(*a*) Jane Todd's case, O. B. 4th July 1711, by Ld. C. J. Eyre and Ld. C. B. Ward, Burnet's MS. Sum. 67.

(*b*) Ralph Packer's case, O. B. 7th April 1714, ib. cor. Ld. C. J. MS. Burnet.

In John Woodward's case, who was indicted for maliciously and feloniously killing two sheep, the property of W. Dalton, it was proved that the prosecutor had only taken the sheep in to agist for another. Whereupon it was objected that the property was not well laid in the agister; and upon reference to the Judges in Michaelmas term 1796, one of them doubted at first, because an agister of cattle is not liable for them at all events, like an inn-keeper for the goods of his guest. The majority, however, thought the conviction right. But the matter stood over till Hilary term 1797, when upon reference to 4 Inst. 293. shewing that an agister has a possession; and 2 Rol. Abr. 551. that he may maintain trespass against any who takes the beasts, all the Judges agreed that the conviction was right.

Woodward's case, Leicester Sum. Ass. 1796, cor. Perryn B. MS. Jud. *Property laid in agister of cattle.* (*vide* Moor, 543.)

(Absent Buller J.)

James Deakin and William Smith were indicted for stealing spoons and other articles, laid in the second count, (on which alone they were convicted,) to be the property of one Markham. The goods had been sent by a tradesman in London to Mr. Broderick at Spalding, by the Spalding coach, and were stolen by the prisoners at Pondersend, out of the boot behind the coach. The question was, Whether they were properly laid to be the property of Markham, who was not the owner, but only the driver of the coach; there being no contract between him and the proprietors, that he should be liable for any thing stolen; and it not appearing that he had been guilty of any laches. The case being referred to the Judges, it stood over for some time; but finally the

R. v. Deakin & Smith, O. B. April 1800, cor. Grose J. MS. Jud. *Property laid in stage-coachman.*

Vide Taylor's case, 1 Leach, 395. ad idem.

Ch. XVI. § 90. *Special property, &c.*

the conviction was holden right; the coachman having the possession, and a special property in the goods committed to his charge.

Larceny by the owner. Ante, 558. 1 Hale, 513.

Upon the same principle it is that a man may be guilty of larceny or robbery of his own goods. For if A. bail goods to B. and afterwards animo furandi steal them from him, with design probably to charge him with the value: or, if A. send his servant with money, and afterwards way-lay and rob him, with intent to charge the hundred: in either case the felony is complete. And even in this latter case, I see no objection to laying the property of the goods in the servant; for though in general it may be said that he has no property in them as against his master, although he has against every other person; yet having a clear right to defend his possession against A.'s unlawful demand, the special property still remains in the servant. But a taking from the servant of the money or goods of his master, in his presence, by putting in fear, is a taking from the master, and the offender may be indicted of robbing him.

1 Hawk. ch. 34. s. 5. Burnet's MS. Sum. 73. Styl. 156. MS. Tracy, 73. 1 Show. 94. 241.

1 Hale, 507. 2 MS. Sum. 238. Sum. 64.

On the other hand, it being a settled principle, that neither the property nor possession in law of goods is changed by any felonious taking of them; it follows that if A. steal goods of B., and after C. steal the same goods from A.; C. is a felon both as to A. and B.; and he may be indicted of stealing the goods of B.

§ 91. *Necessaries for children.* 12 Rep. 113. 1 Sid. 129. MS. Tracy, 67.

Cloaths and other necessaries provided for children by their parents are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way. At the sessions at the O. B. after Easter term 1701, Tracy and Turton Js. and Lovell Recorder, doubted whether the property of a gold chain, which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But Tanner, who had been an ancient clerk of the court, said that it had always been usual to lay it to be the goods of the child in such case: and that many indictments which had laid them to be the property of the father had been ordered to be altered by the Judges.

An

An indictment for sheep stealing laid the property to be in Simon Dodd, the elder, S. D. the younger, John and Gilbert Dodd, and several others of the same name. Simon Dodd the elder proved that he and his son (now dead), took a farm on their joint concern, and kept a stock of sheep, their joint property, upon it. The son died intestate about five years ago, leaving a widow, who died soon after him, and several children (the children named in the indictment). No division was ever made of the stock; from which all the sheep upon the farm at the time of the felony committed were bred, some before and some after the son's death. S. D. the elder continued to occupy the farm and use the stock as before, considering himself acting for his grandchildren, who were still infants, in respect of one moiety; and accordingly continued to keep a regular account with them in his books. After conviction a question was submitted to the Judges, Whether the property were well laid jointly in the grandfather and grandchildren. And in Michaelmas term 1801, they all held it well enough: for at any rate, though in the case of joint traders there were no jus accrescendi, and the remedy survived; yet here the grandfather swearing that he held one moiety for his grandchildren, no person could controvert it, and he might make distribution among them. And some of the Judges also said, that the property might have been laid to be in the grandfather alone, who was in possession of the children's moiety as their agent.

Ch. XVI. § 91. *Necessaries for children.*

John Scott's case, Northumberland Sum. Ass. 1801, cor. Chambre J. MS. Jud.

I now proceed lastly to examine

7. *What is such Evidence of the taking and carrying away being fraudulent or wrongful, with Intent to convert the Goods to the Taker's own Use, and make them his own without the Consent of the Owner, as amounts to Felony.*

§ 92. *Evidence of felonious intent.*

The felonious intent is essential to the offence; and in order to make it felony, the intent to steal ought to be at the time when the party first gets possession of the goods; such a possession at least as is distinct from that of the owner; for a fraudulent intent, originating afterwards, to convert the goods to his own use is not felony: but the original felonious intent may be collected from subsequent acts,

Pult. 129. Staundf. 25.

This

Ch. XVI. § 92. *When originating.* This inquiry may be best made by considering the several defences by which charges of this nature are endeavoured to be palliated or denied. These are,

Defences in larceny.

1. *By a Denial of the Fact itself, or the Party's Participation in it.*
2. *That the Goods were taken upon a Claim of Right, or by Act of Law.*
3. *By Mistake or Accident.*
4. *As a Trespasser or Wrong-Doer, without Fraud.*
5. *By finding.*
6. *By Delivery of a third Person, without Knowledge of the Theft by the Taker.*
7. *By Delivery from or on Behalf of the Owner; or by a Taking with his Consent and Approbation.*
8. *By taking upon Necessity.*

§ 93. *Evidence upon a denial of the fact. Vide* 2 Hale, 289.

1. *By a Denial of the Fact, &c.*

It may be laid down generally, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted, by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent; such as, the length of time which has elapsed between the loss of the property and the finding it again; either as it may furnish more or less doubt of the identity of it; or as it may have changed hands oftener in the mean time; or as it may increase the difficulty to the prisoner of accounting how he came by it: in all which considerations that of the nature of the property must generally be mingled. So the probability of the prisoner's having been near the spot from whence the property was supposed to be taken at the time; as well as his conduct during the whole transaction, both before and after the discovery, are material ingredients in the investigation. But the bare circumstance of finding in one's possession property of the same kind which another has lost, unless that other can from marks or other circumstances satisfy the court and jury

Length of time.

Nature of the property.
Prisoner's vicinity to the spot.
Behaviour.

Identity.

jury of the identity of it, is not in general sufficient evidence of the goods having been feloniously obtained. Though, where the fact is very recent, so as to afford reasonable presumption that the property could not have been acquired in any other manner, the court are warranted in concluding it is the same, unless the prisoner can prove the contrary. Thus a man being found coming out of another's barn; and upon search, corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt.

Ch. XVI. § 93. *On denial of fact.*

So persons employed in carrying sugar and other articles from ships and wharfs have often been convicted of larceny at the O. B., upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could no otherwise be proved. But this must at least be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them; for Lord Hale says he would never convict any person of stealing the goods of one unknown, merely because he could not give an account how he came by them; unless due proof were made that a felony had been committed of those goods.

2 Hale, 290. *Vide* ante, 651.

Neither is the fact of concealment, (the identity of the property not being proved,) of itself evidence of stealing, though undoubtedly very strong corroborative proof of it.

Concealment. 3 Inst. 98.

§ 94.

The confession of the prisoner that he stole the goods is often adduced in this case. And here, as upon other occasions, care must be taken previous to the inquiry to ascertain with certainty that such confession was not procured either by promise or threat; in either of which cases it ought not to be received in evidence. But it frequently happens that by means of such confession, so improperly drawn from the prisoner, the prosecutor comes to the knowledge where the goods are concealed, and in consequence regains possession of them: in which case it has been said by some, that such confessions ought to be received in evidence, corroborated by the fact of finding the goods in the place described by the prisoner. This, it is said, does away the reason upon which the general rule, that confessions so improperly ob-

Confession. *Vide* tit. Evidence.

Ch. XVI. § 94. *Confession.*

tained cannot be received in evidence, is founded; because the reason being to guard against the possibility of an innocent person being from weakness seduced to accuse himself, in hopes of obtaining thereby more favour, or for fear of meeting with worse punishment; that reason is done away if such confession be substantiated by an actual finding of the goods accordingly in the place described, which could not probably be known to the party if he were not privy to the felony. But this opinion must it seems be taken with some grains of allowance; for even in such case, the most that is proper to be left to the consideration of the jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner's having stolen or put them there, which is to be collected or not from all the circumstances of the case: and this is now the more common practice.

Per Le Blanc J. in R. v. Grant and Craig, Exeter, March 1801. Per Heath J. at Exeter, about 1790, Rex v. Marian Hodge, Wells Sum. Ass. 1794, cor. Grose J. Warrickshall's case, O. B. 1783, cor. Nares J. & Buller Js. ib.

Eyre B. 1 Leach, 298. Mozey's case, O. B. 1784, cor. Perryn B. and 301. n.

Hervey's case, Bodmin Sum. Ass. 1800.

In the case of Richard Harvey at Bodmin Summer assizes 1800, Lord Eldon said, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal; unless the fact itself proved, would have been sufficient to warrant a conviction without any confession leading to it. And he so directed the jury in that case. In Lockhart's case, who was indicted for stealing jewels, a confession having been obtained from him upon promises of favour that he had stolen the jewels, and had disposed of part of them to a Mr. Grant; the latter was admitted as a witness to prove that he had received them from the prisoner.

Lockhart's case, O.B. 1785, 1 Leach, 430.

Where a prisoner has been once induced to confess upon a promise or threat; it is the common practice to reject any subsequent confession of the same or like facts, though at a subsequent time. But in one case where hopes had been holden out to a prisoner to confess; and when brought before a magistrate, he refused unless upon conditions; Buller J. admitted the general rule with some qualification, by observing that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account; and it ought most clearly to appear that the prisoner thoroughly understood such

such warning, before his subsequent confession could be given in evidence. Ch. XVI. § 94. *Confession.*

As to what shall be considered as a threat or promise, saying to the prisoner that it would be worse for him if he did not confess, or that it would be better for him if he did, is sufficient to exclude the confession, according to constant experience.

2. *That the Goods were taken on a Claim of Right.* § 95.

On claim of right. By the party's own act.

Goods may be so taken by the party's own immediate act, or by the act of the law through his means. In the first place it has been shewn that a man cannot be guilty of felony in taking his own goods, unless where having bailed them to another, he afterwards steal or rob him of them in order to charge him or the hundred. For else, if a man take another's trees and cut them into boards; or take the other's cloth and make it into a doublet and embroider it; or mingle the other's corn with his own: in all these cases the owner may retake his boards, cloth, and the whole of the corn, (so much at least, I presume, as cannot easily be distinguished from his own,) without being guilty of felony. Ante, 558. 1 Hale, 513.

And here it may be proper to remark, that in any case if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy.

The owner of ground takes a horse for damage feasant, or a lord seizes it as an estray, though perhaps without title; yet these circumstances explain the intent, and shew that it was not felonious, unless some act be done which manifests the contrary; as giving the horse new marks to disguise him, or altering the old ones; for these are presumptive circumstances of a thievish intent. 1 Hale, 506, 7.

After a seizure of uncustomed goods, several broke at night into the house where they were deposited, with intent to retake them for the benefit of the former owner: it was holden that such a design appearing rebutted the presumption of a felonious design to steal, which was laid in an indictment for burglary; however else the parties were culpable in doing such an act. Rex v. Knight and another, ante, 510.

What

Ch. XVI. § 96. *On claim of right.*

§ 96. *By act of law.*

What has been just said of a colourable title will of course apply in at least as strong a degree to the next subject of consideration; where a party gets possession of another's goods by act of law. But however difficult it may be to establish proof of a felonious intent in such cases, yet if the fact be clearly made out, it is one of the highest aggravations of the offence of larceny. It is converting the process of the law, which is the best security for property, into an instrument of rapine and plunder.

1 Hale, 507. 1 Hawk. ch. 33. s. 8. 3 Inst. 108.

A. having a design to steal B.'s horse, which was impounded on a distress, enters a plaint of replevin in the sheriff's court for the horse; and thereby getting it delivered to him, runs away with it: or intending to steal the goods of B. in his house, he delivers an ejectment fraudulently; and having obtained judgment against the casual ejector, he gets possession and goes off with the goods: it is felony in either case.

Farr's case, O.B. 1665, cor. Hyde Ch. J. Kelyng and Wild Js. Kel. 43. T. Raym. 276.

Richard Farr and Eleanor Chadwicke were indicted for breaking the house of Robert Stanyer, and putting his wife in fear, and stealing goods from thence. It appeared that the prisoners, intending to rifle the house in which Mrs. Stanyer lived apart from her husband, went to an attorney, and pretending that Mrs. Stanyer was Farr's tenant, and in arrear for rent, obtained possession of the house by means of a fraudulent ejectment; and at the same time arrested Mrs. Stanyer under a writ of latitat, and caused her to be carried to prison; and then the prisoners rifled the house and took away the goods, and hid some, and altered the marks upon the others, and sold the rest. And being questioned concerning these acts, and asked what colour of title they had to the house or the goods, they could pretend none. But it appeared that the true landlord had received the rent of it for many years, and that no rent was in arrear. Neither could they pretend to any cause of action against Mrs. Stanyer. Upon which the jury were directed, that if they believed that the prisoners had done all this with an intent to rob, they ought to find them guilty; which was accordingly done; and they were both executed. So if under pretext or colour of a capias ultagatum, sued out after an outlawry clandestinely obtained against a visible man, his goods be taken with a felonious intent, it will be felony.

3. *By*

3. *By Mistake or Accident.*

Ch. XVI. § 97.
By mistake or accident.

Analogous to the taking upon a claim of right is the taking by mistake arising from heedlessness, or from mere accident. As if one man's sheep mix with another's flock, and he drive them with his own, or even shear them, not knowing or taking heed of the difference; it is no felony. But if he knew them to be another's, as by having that other's mark which he defaces, and places his own mark on them; this is evidence of a felonious intent. So it is if he appear desirous of concealing the property, or of preventing the inspection of the owner, or of any who might make the discovery: or if, being asked, he deny the having them; although his knowlege thereof be proved. In like manner the contrary mode of conduct in these several respects is evidence to rebut the felonious intent.

§ 97.
By mistake or accident.
2 Hale, 507, 9.

4. *On taking as a Trespasser, without Fraud.*

§ 98.
As a trespasser.
1 Hale, 509.
4 Blac.Com.232.

The taking may amount only to a trespass, and the circumstances in such case must guide the judgment. As where a man takes another's goods openly before him or before other persons, otherwise than by apparent robbery; or having possessed himself of them, avows the fact before he is questioned.

So where a man takes another's harrow or plough, and after plowing his own land, returns it to the place whence he took it, or tells the owner of his using it. So taking a horse off the common, and after riding, returning it there again, is but a trespass. But if the party had sold it, this would be declarative of the first taking being felonious; and in doubtful cases the safest rule is to incline to acquittal rather than conviction.

Burnet's MS.71.
Lamb. 269.
Crompt. Just. 34. b.
The fisherman's case, York, 26 Eliz.

The felonious intent being as essential to constitute the offence of robbery as of larceny, it follows that if such intent be wanting, though goods be taken by such force or putting in fear as would otherwise be sufficient to constitute robbery, yet it will only amount to a trespass. A traveller met a fisherman with fish, who refused to sell him any; and he by force and putting in fear took away some of his fish, and threw him money much above the value of it: and judgment was respited, because of the doubt whether the intent were

felonious

Ch. XVI. § 98. *As a trespasser.*

felonious on account of the money given. Such, however, seem properly to be questions for the consideration of the jury. And the circumstance of the party's offering the full value or more at the time ought to be left to them to shew that his intention was not fraudulent, and so not felonious: for it does not necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious (*a*); though it is, I apprehend, pregnant evidence in the negative. But if it appear that the offering a price be merely a pretence for fraudulently acquiring another's property (*b*); as where the owners of corn or flour were compelled by individual force, or the threats of a mob, to take much less than it was worth; that shews the intent to be fraudulent and felonious; or, according to the civil law, *lucri causâ:* and the parties are guilty of felony. The distinction in these cases seems to turn on the fraud, which is of the essence of these offences, as was at first shewn. And this is exemplified by a case of still greater nicety, where the original assault was clearly with a felonious intent; and yet the taking of the goods was no more than a trespass. At the O. B. 1698, before Holt C. J. and other Judges, it was found that A. assaulted B. on the highway with a felonious intent, and searched the pockets of B. for money, but finding none, A. pulled off the bridle of B.'s horse, and threw that and some bread which B. had in pannels about the highway, but did not take any thing from B.: and resolved upon conference with all the Judges, that this was no robbery, because nothing was taken from B. The better reason seems to be, that the particular goods taken were not taken with a felonious intent; for surely there was a sufficient taking and separation of the goods from the person.

(*a*) Per Grose J. R. v. Lane and others, Bodmin Sum. Ass. 1796.

(*b*) Simmons's case, post. s.128. Burrows v. Wright, 1 East's Rep. 615. and Greasley v. Higginbottom, ib. 636. Just. Inst. 4. s. 1.

Ante, s. 2.

O. B. 1698, MS. Tracy, 71. Ex relatione Ward C. B. from his MS.

Philipps and Strong were indicted for stealing a mare and gelding of John Goulter. It appeared in evidence that the prisoners had gone to the stables of Goulter, who kept an inn at a place called Petty France, in the night of the 26th of February last, opened them, and taken out the horse and mare, the subject of the indictment, and rode on them to Lechlade about 32 or 33 miles off, where they carried them to different inns, and left them in care of the ostlers, directing

Philipps and Strong's case, Gloucester Sp. Ass. 1801, cor. Lawrence J. MS. Jud.

The prisoners enter another's stable at night, and take out his horses and ride them 32 miles and leave

directing them to clean and feed them, and saying that they should return in three hours. In the course of the same day the prisoners were taken at a distance of 14 miles from Lechlade, walking towards Farringdon in Berkshire, in a direction from Lechlade. The jury being directed to consider, whether the prisoners when they took the horse and mare intended to make any further use of them than to ride them, for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out; and whether they intended to return to Lechlade, and make any further use of them; found the prisoners guilty; but added, they were of opinion that the prisoners meant merely to ride them to Lechlade, and to leave them there; and that they had no intention to return for them, or to make any further use of them. Upon this finding, at a conference first in Easter, and afterwards in Trinity term, 1801, the Judges, (dissentiente Grose J. et dubitante Lord Alvanley(*a*),) held it to be only a trespass and no felony. For there was no intention in the prisoners to change the property, or make it their own; but only to use it for a special purpose, i. e. to save their labour in travelling. The Judge who dissented thought the case differed from those first above-mentioned; because here there was no intention to return the horses to the owner, but, for aught the prisoners concerned themselves, to deprive him of them. But the rest agreed that it was a question for the jury; and that if they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned.

Ch. XVI. § 98. *As a trespasser.*

them at an inn, and are afterwards found pursuing their journey on foot. On a finding by the jury that the prisoners took the horses merely with intent to ride and afterwards leave them, and not to return or make any further use of them; held trespass and not larceny.

5. *On a Taking by Finding.* § 99.

By finding.

Another defence is, that the goods were found. This is connected in great measure with the first mentioned mode of defence. It is the most trite excuse in cases of larceny, and in general the least founded. Still if the fact be so; as where one finds a purse in the highway, which he takes and carries away; it is no felony; although it may be attended with all those circumstances which usually prove a taking

1 Hale, 506, 7. 3 Inst. 98. 1 Hawk. ch. 33. s. 3. Ante, s. 88.

(*a*) His Lordship, who had been recently called to the bench of C. B., not having been present when the case was first under consideration, declined giving any express opinion.

with

Ch. XVI. § 99. *On finding.*

with a felonious intent; such as denying or secreting it. However, this must be understood where the finder really believes the goods to have been lost by the owner, and does not colour a felonious taking under such a pretence. Therefore where a man's goods are in such a place where ordinarily they are or may be placed, and a person takes them away with a view to convert them to his own use, the pretence of finding is no excuse. Thus the taking of another man's horse from his own or his neighbour's ground or common, with intent to steal it, is felony. One hides a purse of money in his corn mow; his servant finding it takes part of it: if by circumstances it can appear that he knew his master laid it there, it is felony. But then the circumstances must be pregnant; otherwise it may be reasonably interpreted to be a bare finding, because the purse was deposited in so unusual a place. But where a gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use; held felony: for he must have known where he took up the gentleman and his trunk, and where he set him down; and therefore he ought to have restored it to him. A similar circumstance occurred again at the O. B. in 1786. The prisoner Wynne, who was a hackney coachman, had taken up Mr. Weldon the prosecutor, with several packages, at the Adelphi, and set him down in Orchard Street, where the prisoner and a servant took all the things out of the coach, except one corded box, which was put under the seat, and contained several articles; for the stealing of which, and the box itself, the prisoner was indicted. The prisoner being then discharged, drove off; soon after which the box was missed. In a few days the prisoner was traced and taken, and the box found, in consequence of a direction from him, at a Jew's, uncorded, and part of the goods only in it; particularly several papers were missing, and among them two bonds mentioned in the indictment. The jury were of opinion under the circumstances, that the coachman uncorded the box and destroyed the papers, with an intent to embezzle the goods found in the box; and found him guilty. And in Easter Term 1786 a majority of the Judges held the conviction proper. Austin's case at the O. B. in 1777 was there mentioned as in point.

Lamb's case, O. B. 1694, Serjt. Forst. MS. *Stealing box left in hackney coach.*

Wm. Wynne's case, O. B. 1786, cor. Eyre B. 2 MS. Sum. 231. and MS. Gould and Buller Js. (S. C. 1 Leach, 460.) *Stealing box left in a hackney coach.*

Post. s. 115.

(Absent Lord Mansfield C. J. the Ch. B. and Nares J.)

point. On the other hand, evidence to shew that the finder endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that he could not be found; or that he made known his acquisition, so that he might make himself responsible for the value in case he should be called upon by the owner; are circumstances to rebut the implication of a felonious taking and conversion. Ch. XVI. § 99. *On finding.*

6. *On a Possession by Delivery of a Third Person.* § 100.

It has been stated before that the person in whose possession stolen goods are found must account how he came by them; otherwise he may be presumed to be the thief. And it is a common mode of defence to state a delivery by a person unknown, and of whom no evidence is given: little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen where persons really innocent have suffered under such a presumption; and therefore where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence from the time when the goods might first be presumed to have come into his possession. This defence may also be more or less probable on account of the length of time which has elapsed from the losing of the goods by the owner to the finding of them in the prisoner's possession, which I have before adverted to. *By delivery from a third person, the party not knowing of the felony.* Ante, s. 93. Ante, 556.

The most comprehensive and most intricate line of defence is, § 101. *Taking on delivery by or on behalf of the owner; or by his consent and approbation.*

7. *That the Goods were delivered to the Prisoner by or on Behalf of the Owner; or were taken with his Consent or Approbation:*

For if it be proved that there was no trespass or felonious intent in *taking* the goods, no subsequent conversion of them can amount to felony. 1 Hawk. ch. 33. s. 2, 3.

The primary inquiry to be made is, Whether *the taking* were *invito domino*, or without the will or approbation of the owner: for this is of the very essence of larceny, and its kindred offence robbery. And therefore where one Salmon conspired with Macdaniel and other persons to procure Rex v. Macdaniel and others, O. B. 1755, Fost. 121. 4 Blac. Com. 230.

Ch. XVI. § 101. *Possession by delivery or consent of owner.*

procure two others, ignorant of the design, to rob him on the highway, in order to procure to themselves the reward given by act of Parliament for apprehending robbers on the highway; and he accordingly went, in pursuance of such agreement, to the place appointed, where the supposed robbery was effected; the case was holden not to amount to felony.

Norden's case, O. B. 1754, Fost. 129.

Yet in another case one Norden, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend him: for which purpose he put a little money and a pistol into his pocket, and attended the coach in a post chaise till the highwayman approached the carriages, and presenting a weapon, demanded the money of the passengers. Norden gave him his money; and then jumping out of the chaise with his pistol in his hand, with the assistance of some others, took the highwayman. This was ruled clearly to be robbery, and the felon was convicted. For this case differed widely from the former: there was no previous concert with the highwayman directly or through the medium of others that the robbery should be effected, or any thing to lessen the danger of the attempt.

Rex v. Eggington and others, Stafford Sp. Ass. 1801, MS. Jud. S. C. ante, 496. *The owner of goods, knowing of an intention in the prisoners to steal them, they having plotted so to do with his servant, directed his servant to carry on the business with a view to the detection of the thieves. In consequence of which the servant, with the consent of his master, agreed with the prisoners to open the outer door to them, and let them into the*

In Eggington's case beforementioned, who was indicted for burglary and larceny, it appeared that the prisoners, intending to rob Mr. Boulton's manufactory at Soho, had applied to one Phillips his servant, who was employed there as a watchman, to assist them in the robbery. Phillips assented to the proposal of the prisoners in the first instance; but immediately afterwards gave information to Mr. Boulton, the principal proprietor, and in whom the property of the goods taken (together with other persons his partners) was laid; *telling him what was intended, and the manner and time the prisoners were to come; that they were to go into the counting-house, and that he was to open the door into the front yard for them.* In return, Mr. Boulton told him *to carry on the business;* that he (Boulton) would *bear him harmless; and Mr. Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time.* In consequence of this information, Mr. Boulton removed from the counting-house every thing but 150 guineas and some silver

silver ingots, which he marked to furnish evidence against the prisoners; and lay in wait to take them, when they should have accomplished their purpose. On the 23d of December, about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard, and from thence they and Phillips went through a door which was left open, up a staircase in the centre building leading to the counting-house and rooms where the plated business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked; and took from thence the ingots of silver and guineas. They then went to the story above into a room, where the plated business was carried on, and broke the door open and took from thence a quantity of silver, and returned down stairs; when one of them unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard; where all (except one who escaped), were taken by the persons placed to watch them. On this case two points were made for the prisoners; First, that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips were his acts. Secondly, That if the facts proved amounted to a felony, it was but a simple larceny, as the building broke into was not the dwelling-house of any of the persons whose house it was charged to be; and that there was no breaking, the door being left open. After conviction, the case was argued before all the Judges in the Exchequer Chamber; and, for the reasons before stated, all the Judges agreed that the prisoners were not guilty of the burglary.

Ch. XVI. § 101.

Possession by delivery or consent of owner.

house, where they broke open inner apartments and took the goods. Held larceny by a majority; one doubting, because of the owner's assent and partial encouragement to the felon by means of his servant.

May 9th, 1801, ante, 496.

But with respect to the larceny, the majority thought there was no assent in Boulton: that his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had: and that this could no more be considered as an assent, than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. That there was no distinguishing between the degrees of facility

Ch. XVI. § 101. *Possession by delivery or consent of owner.*

cility a thief might have given to him. That it could only be considered as an apparent assent. That Boulton never meant that the prisoners should take away his property. And the circumstance of the design originating with the prisoners, and Boulton's taking no step to facilitate or induce the offence until after it had been thought of and resolved on by them, formed with some of the Judges a very considerable ingredient in the case; and differed it much from what it might have been if Boulton had employed his servant to suggest it originally to the prisoners. Lawrence J. doubted whether it could be said to be done invito domino, where the owner had directed his servant to carry on the business; to open the door; and meant that the prisoners should be encouraged by the presence of that servant; and that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away. Finally, the prisoners were recommended to mercy on condition of being transported for seven years, the punishment they would have been liable to for the larceny. The decision in the above case is consonant to the rule laid down in the civil law under similar circumstances.

Vide Just. Inst. lib. 4. tit. 1. s. 8.

This sort of defence, that the property was delivered by and with the consent of the owner, has been not unfrequently set up in the case of robbery from the person, where pretended gifts had been extorted by threats of accusing persons of a certain odious crime. This and other instances of extorted concessions will hereafter be considered more fully under the appropriate division of robbery from the person.

§ 102. *Distinction as to parting with the property or only the possession of the thing delivered.*

The next inquiry is whether the owner, in making the delivery, intended to part with the *property*, or only with the *possession* of the thing delivered. For if he parted with the *property* to the prisoner, by whatever fraudulent means he was induced to give the credit, it cannot be felony. But if the bare *possession* only were delivered, then it is material to inquire whether the delivery were by way of charge, or as a general bailment, or for some special purpose. And each of these several sorts of delivery will furnish matter of distinct consideration, the blending whereof together has given rise

rise to most of the doubts which have occurred on this subject. Ch. XVI. § 102. *Owner parting with property or possession.*

§ 103. *Acquiring the property by fraudulent appearances.*

The first branch of inquiry relates to those cases where persons, led by fallacious appearance held out to them by a prisoner or those with whom he was acting in concert, have given him credit for goods which without such fraud he would never have obtained, and of which he previously intended to cheat the owners. This, where the property is intended to be transferred to the identical person to or for whom the delivery is made, does in no case amount to larceny: because however fraudulent the intent may be, yet there is no trespass in the taking, without which there can be no larceny or robbery. And where such credit is obtained by means of false tokens or pretences, the legislature have supplied a particular remedy. *Vide* 1 Hale, 506. *Vide* post. tit. Cheats.

This distinction between parting with the *property* or the *possession* has been discussed and settled in a variety of cases which will be mentioned. But to pursue the train of the subject with more regularity than a chronological arrangement of them would admit of, I shall begin with some of a recent date. Justin Harvey was indicted for horse stealing: and it appeared in evidence that the prisoner met the prosecutor at a fair with the horse which he had brought there for the purpose of selling it; and being known to him, proposed to him to become the purchaser. They walked together in the fair; and upon a view of the horse, the prosecutor told the prisoner he should have it for *L.* 8; and calling his servant, ordered him to deliver it to the prisoner; who immediately mounted the horse, telling the prosecutor that he would return immediately and pay him: the prosecutor replied *very well:* and the prisoner rode away with the horse and never returned. Gould J. ordered an acquittal; for here was a complete contract of sale and delivery: the property as well as the possession was entirely parted with. Rex v. Harvey, Chelmsford Ass. 1787, cor. Gould J. 2 Leach, 523. *Obtaining delivery of a horse sold on promise to return immediately and pay for it; and riding off and not returning; no felony.*

Nicholson and others were indicted for stealing two bank post-bills, the one of 20*l.*, the other of 15*l.*, and seven guineas, the property of William Cartwright. It appeared that prisoner Nicholson introduced himself to the prosecutor without any previous acquaintance, at his apartments in the Charter- R. v. Nicholson, Jones, and Chappel, O. B. Sess. bef. Hil. 1794, cor. Macdonald C. B. MS. Buller J. and MS. Jud. (S. C. 2 Leach, 698.)

Ch. XVI. § 103. *Property or possession passing by delivery of money won at play by fraud.*

Several sharpers inveigle one to bet with them; and after suffering him to win at first contrive to strip him of a large sum on the event of a bet; which the jury find to be a preconcerted scheme to get his money: Yet as he parted with his property under the idea that it had been fairly won; held no felonious taking.

Charter-house, under pretence of inquiring what the rules of the charity were. He discovered that the prosecutor had some money, by his desk having been opened during the conversation. Nicholson desired him to walk with him, and they went to a public house, having been joined by the prisoner Chappel. Some liquor was called for, when the other prisoner Jones came into the room, and said he had come from Coventry to receive 1400*l.* and produced a quantity of notes. Chappel said to him, "I suppose that you think that "no one has any money but you." Jones answered, "I'll "lay 10*l.* that neither of you shew 40*l.* in three hours." They all went out, Nicholson and Chappel saying they should go to the Spotted Horse; and both asked the prosecutor if he could shew 40*l.* He answered, he believed he could. Nicholson accompanied the prosecutor to his room at the Charter-house, where the prosecutor took out of his desk the two post-bills in question, and five guineas. Nicholson then advised him to take a guinea or two more, and he accordingly took two more. They then went to the Spotted Horse, where Jones and Chappel were in a back room. Jones put down a 10*l.* note for each who could shew 40*l.* The prosecutor shewed his 40*l.* by laying down the notes and guineas; but did not recollect whether he took up the 10*l.* given to him. Jones then wrote four letters with chalk on the table, and going to the end of the room turned his back, and said that he would bet them a guinea a-piece that he would name another letter which should be made and a bason put over it. Another letter was made, and covered with the bason. Jones guessed wrong, and the others won a guinea each. Chappel and Nicholson then said, we may as well have some of Jones's money, for he is sure to lose, and we may as well make it more for we are sure to win. The prosecutor staked his two notes and the seven guineas. Jones then guessed right: and the notes lying on the table, Jones swept them all off, and went to the door of the room; the other prisoners sitting still. A constable immediately came in and apprehended the prisoners. The prosecutor said, on cross examination, that he did not know whether the 10*l.* note given to him by Jones on shewing 40*l.* were a real one or not. That having won the first wager by guessing the letter, if the

the matter had ended there, he should have kept the guinea. That he did not object to Jones taking his 40*l.* when he lost, and would have taken the 40*l.* if he had won. The officers who had taken the prisoners, having searched them, found a great many pieces of thin paper upon them, having numbers, such as, 100, 50, &c. something in the manner of bank notes, the bodies of the notes being advertisements of different kinds. No good notes were found upon them, but about eight guineas in cash, a sum insufficient to have paid 40*l.* if Jones had lost the wager. A lump of paper was put into the prosecutor's hands by Jones when the officers came in, which was afterwards found to contain the two genuine post-bills mentioned in the indictment. It was contended on the part of the prisoners that this was a mere gaming transaction, or at most only a cheat, and not a felony. And a doubt being entertained on the bench as to the latter point, it was left to the jury to consider, whether this were a gaming transaction, or whether it were a preconcerted scheme by the prisoners, or any of them, to get from the prosecutor the post-bills and cash. The jury were of opinion that it was a preconcerted scheme in all of them for that purpose; and found them guilty. But in Hilary term 1794 all the Judges held the conviction wrong: for here the *property* was parted with by the prosecutor.

Ch. XVI. § 103. *Property or possession passing by delivery of money won at play by fraud.*

At the same sessions John Parks was indicted for stealing a piece of silk of the value of 10*l.*, the property of Thomas Wilson. It was proved that the prisoner had called at Wilson's warehouse, and having looked at several pieces of silk, selected the one in question, and said that his name was John Williams; that he lived at No. 6, Arabella-row, Pimlico; and that if Wilson would send it that evening he would pay him for it. The prosecutor accordingly sent his shopman with it, and the next morning had two notes given to him by the shopman: who proved that as he was taking the goods according to the direction, he met the prisoner between Hyde-park and the row; that the latter went with and took him into a room at No. 6, Arabella-row, where he delivered a bill of parcels to the prisoner; who examined it, and gave him two bills drawn by Frith and Co. at Bradford on Taylor and Co. in London. The bills were for 10*l.* each, but the goods

R. v. Parks, O. B. Sess. bef. Hil. term 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 703.) *The prisoner, with intent to defraud, orders one to send him goods to be paid for on delivery, and afterwards gives the servant who brings them bills in payment which are good for nothing. Held no larceny: for the owner's servant, (though his master did not intend to give the prisoner credit)*

Ch. XVI. § 103. *Property or possession passing by delivery on a sale procured by fraud.*

goods only came to 12*l.* 10*s.* The shopman said that he had not cash to give the balance; to which the prisoner answered, that he wanted more goods and should call the following day: but he saw no more of him till he was apprehended. The notes having been carried to Taylor and Co. were declared by them to be good for nothing; and that they had no correspondent at Bradford. It was further proved, that before the goods were sent from Wilson's, they were entered in a memorandum book, and the prisoner made debtor for them; and that they were carried into the ledger about a month after in the ordinary course; and that the prisoner still stood debitted there for the amount. That this was Wilson's practice in all cases where goods were not paid for immediately. A doubt arising whether this were not a sale, and such a delivery as would change the property, the Chief Baron left it to the jury to consider whether there were from the beginning a premeditated plan on the part of the prisoner to obtain the goods, without paying value for them? and whether this were a sale by Wilson, and a delivery of the goods with intent to part with the property; he having received bad bills in payment through the medium of his servant? The jury said that they were of opinion that the prisoner from the beginning intended to defraud Mr. Wilson; and that it was not Wilson's intention to give the prisoner credit; and found him guilty. But in Hilary term 1794 the Judges were of opinion that the conviction was wrong; the *property* as well as the possession having been parted with upon receiving that which was accepted as payment by the prosecutor's servant, though the bills afterwards turned out to be of no value.

parted with the property by accepting such payment as was offered.

§ 104. *No difference where delivery from the owner upon credit obtained under another's name.*

It makes no difference in these cases, that the credit was obtained by fraudulently using another's name, to whom in truth the credit was intended to be given, if the delivery of the goods were made by the owner or any other having the disposing power for that purpose.

Coleman's case, O. B. June 1785, Sess. Pap. No. 648., (1 Leach, 339. n. S. C.) *Obtaining silver on pretence of sending half guinea presently in exchange no felony.*

In the case of Catherine Coleman, it appeared that she went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half a guinea's worth of silver, and that she would

would send the half guinea presently. The prisoner obtained the silver and never returned: and this was holden no felony. This was in truth a *loan* of the silver, upon the faith that the amount would be repaid at another time. It was money obtained on a false pretence. And the same determination has been made in similar cases at the Old Bailey.

Ch. XVI. § 104.
Property or possession passing by delivery upon a loan obtained by fraud.

James William Atkinson was indicted for stealing two bank notes, the property of William Dunn, against the statute. It appeared that the prisoner sent one Dale (to whom he was unknown) with a letter directed to Dunn; bidding Dale to tell Dunn that he brought the letter from Mr. Broad; and to bring the answer to him (the prisoner) in the next street, where he would wait for him. Dale accordingly carried to Dunn the letter, which was written in the name of Broad, a friend of Dunn's, soliciting the loan of 3*l.* for a few days; and desiring that the money might be inclosed back in the letter immediately. Dunn thereupon sent the bank notes in question, inclosed in a letter directed to Broad, and delivered the same to Dale, who delivered them to the prisoner as he was first ordered. The letter turned out to be an imposition. It was objected at the trial that this was no felony, because the absolute dominion of the property was parted with by the owner, though induced thereto by means of a false and fraudulent pretence. And on reference to the Judges after conviction, all present held that it was no felony; on the ground that the property was intended to pass by the delivery of the owner; and that this case came within the stat. 33 H. 8. c. 1. against false tokens, which particularly speaks of counterfeit *letters*. It was observed in the course of the debate, that this differed from Noah Pearce's case; for there the property did not pass; the post-master having no property in the mail bag to part with; but here the prosecutor parted with his property when he lent it as a loan.

Atkinson's case, O. B. Sept. 1799, cor. Le Blanc J. MS. Jud.
One writing a letter in the name of another to a third person to borrow money, which he obtains by that fraud, is only guilty of a misdemeanor. Vide post. tit. *Cheats.*

Mich. Term 1799, (absent Buller J.)

Ante, s. 39.

On the same ground the above case is also distinguishable from that of Wilkins, which happened prior to it in point of time, but does not appear to have been adverted to. John Wilkins was convicted of stealing a quantity of stockings, the property of William Waite. It appeared in evidence that the prisoner shortly before had met Mr. Waite's apprentice on Ludgate-Hill, and asked him if he were going to

Wilkin's case, O. B. Ap. 1789, MS. Buller J. and MS. Jud.
The owner sends goods by his servant to be delivered to A.; *but* B. *fraudulently*

Ch. XVI. § 104. *Property or possession passing by delivery from one who had no disposing power.*

procures the delivery to himself by pretending to be A.: Held felony.

Mr. Heath, a hosier in Milk-street. The apprentice had at that time two parcels under his arm directed to Mr. Heath, containing the articles in question; and having answered in the affirmative, the prisoner told him that he knew his master, and owed him for those parcels; and he then gave the lad a parcel, which was afterwards found to contain two dish-clouts of no value, telling him to take it to his master directly, that his master might forward it to a Mr. Brown: and the prisoner, with the approbation and consent of the apprentice, took from him the two parcels containing the stockings. The boy then left the prisoner. But a suspicion arising soon in his mind, he walked after him, overtook him, and asked him if he was Mr. Heath; which the prisoner answering in the affirmative, the boy was satisfied, and left the prisoner with the goods, which were never afterwards recovered. On this evidence, together with the fact that the prisoner was not Mr. Heath, the jury found the prisoner guilty, and that he had gotten possession of the goods in the manner above described, and converted them wrongfully to his own use. But the Recorder, doubting whether the crime amounted to felony, referred the case to the Judges, all of whom present in Hilary term 1790 were of opinion that the conviction was proper. In the printed report of this case, Mr. Justice Gould, in giving the reasons of their judgment, lays down these rules as clearly settled; that the possession of personal chattels follows the right of property in them; that the possession of the servant was the possession of the master, which could not be devested by a tortious taking from the servant; that this rule held in all cases where servants had not the absolute dominion over the property, but were only entrusted with the care or custody of it for a particular purpose.

(Absent Perryn B. and Heath J.) 2 Leach, 586.

Ante, 671.

The above reasoning points out the difference between that and Parks' case before mentioned, where the servant was entrusted with the power of disposing of the goods to the prisoner.

§ 105. *Delivery before sale complete.*

It frequently happens in these cases, that the prisoner goes off with the goods before any sale is actually concluded; or where there has only been a delivery upon a condition, by way of pledge, or the like, to have the goods returned again.

In

In these cases the property not being parted with by the owner, if the prisoner obtain the possession by fraud, with intent to steal the goods, it amounts to felony. Sharpless and Greatrix were convicted of stealing six pair of silk stockings of Owen Hudson; on which a case was reserved for the consideration of the Judges; which stated that Greatrix in the character of servant to Sharpless had left a note at Hudson's shop, who was a hosier, desiring that he would send an assortment of silk stockings to his master's lodgings, at the Red Lamp in Queen-square. The hosier having taken them according to direction, Greatrix opened the door to him, and introduced him into a parlour, where Sharpless was sitting in a dressing gown, his hair just dressed, and an unusual quantity of powder over his face. Having looked at some of the stockings, and asked the price, which he was told was 14*s.* a pair, he desired Mr. Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Hudson hung the six pair of stockings which Sharpless had looked out on the back of the chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During Hudson's absence the prisoners decamped with the goods, which were proved to have been afterwards pawned by one of them. The Judges were of opinion that the conviction was right; for the whole of the prisoners' conduct manifested a preconceived design to obtain a tortious possession of the property: and the verdict of the jury imported that in their belief the evil intention preceded the possession of the goods by them. But that even independent of that, there did not appear a sufficient delivery to change the property.

Ch. XVI. § 105.
Property or possession passing by delivery on sale incomplete.

R. v. Sharpless and Greatrix, O. B. May 1772, cor. Gould J. and Adams B. 1 Leach, 108.
Goods examined by one pretending to become a purchaser, and set apart from the rest, but not actually bargained for or delivered, were afterwards carried off by him while the owner was sent away on pretence of getting more; held felony; the property not being transferred.

§ 106.
On agreement to discount.

At the O. B. J. H. Aickles was tried for stealing a bill of exchange of 100*l.* value, the property of S. Edwards. The prosecutor had applied to several persons to get the bill discounted, which was drawn by himself: and some days afterwards the prisoner, a total stranger to him, left this address at Edwards's lodgings. "Mr. H. No. 21, Great Pulteney Street, from 6 to 7 in the evening, or from 11 to 12 in the morning." In consequence of which Edwards called on the prisoner there, who informed him that he was in the discounting

R. v. Aickles, O. B. Jan. 1784, cor. Ashhurst and Heath Js. 1 Leach, 330.
Whereupon an agreement with the prisoner to discount a bill of exchange it was delivered into his hands to satisfy

Ch. XVI. § 106.

Property or possession passing by delivery, on discounting incomplete.

himself in the first instance of the goodness of the bill, but the owner not intending to trust him with it without receiving the money, directed his clerk to follow the prisoner to the place where the money was to be paid, and not to leave him without receiving it: held that the prisoner afterwards contriving to run away with the bill without payment was guilty of larceny, the property not being transferred before payment of the money.

discounting line, and would discount bills for him at the usual premium of 2½ per cent. agency, provided they were accepted by responsible persons. In three weeks time the prosecutor sent one Croxall, his clerk, to the prisoner to know whether he would discount the bill in question, which was accepted by Mr. R. Wells of Cornhill, to whom he referred him. The prisoner returned with Croxall to Wells' house, where he agreed with Edwards to discount the bill for 2½ per cent. agency, exclusive of the legal interest for two months. Edwards then delivered the bill into the hands of the prisoner, and referred him to Wells to satisfy himself that it was a genuine acceptance; which Wells affirming, the prisoner, addressing himself to Edwards, said, that if he would go with him to Pulteney Street, he would give him the cash. Edwards replied that it was not convenient for him to go; but that Croxall should attend the prisoner, *and pay him the 25s. agency, and the discount on receiving the* 100*l.* On their departure Edwards whispered his clerk not to leave the prisoner without receiving the money, nor to lose sight of him; promising to follow them in half an hour. Croxall went with the prisoner to his lodgings in Pulteney Street, where the prisoner shewed him a room, and desired him to wait while he fetched the money, saying it was only about three streets off, and he should be back again in a quarter of an hour. Croxall, however, followed him down Pulteney Street, but in turning the corner of an adjoining street, he missed him. He afterwards walked up and down the street for a long time, but without success: and he and Edwards, who joined him, returned to the prisoner's lodgings, where they waited three days and nights for him in vain. Shortly after, however, the prisoner was apprehended at another place, when he expressed his sorrow, and promised to return the bill. It was proved that the bill had been seen a few days before the trial in a state of negotiation in the hands of a Mr. Smith; and that a subpœna duces tecum had been served upon him; but he did not appear, nor was the bill produced in evidence. It was therefore objected, First, That the bill itself ought to have been produced in evidence. Secondly, That the facts, admitting them to be well proved, did not amount to felony. The Court left the case with the

jury

jury to consider; first, Whether they thought the prisoner had a preconcerted design to get the note into his possession with an intent to steal it? And next, Whether the prosecutor intended to part with the note to the prisoner without having the money paid first? The jury found the affirmative of the first, and the negative of the second question; and concluded, that the prisoner was guilty. And upon reference to all the Judges, they held the conviction proper against both the objections.

Ch. XVI. § 106.

Property or possession passing by delivery on discounting incomplete.

It may not be improper to observe upon the above case, that from the whole transaction it appeared that Edwards never gave credit to the prisoner. It is true he put the bill into his hand after they had agreed upon the terms on which it was to be discounted, that by shewing it to Wells he might satisfy himself that it was a genuine acceptance. But besides that this was an equivocal act of delivery in itself, it seems sufficiently explained by the subsequent acts: for Edwards, or his clerk by his direction, continued with the prisoner until he ran away, for the very reason, because they would not trust him with the bill. In other words, Edwards would not give the prisoner credit for the property of the bill; and that being the case, he could no more be said to have parted with the property therein, nor as it seems with the legal possession, than a tradesman may be said to do, who being desired by a person coming into his shop to let him see some cravats, put the goods into his hands; and being asked the price, which he mentioned, the thief offered less, and ran away with the goods without paying for them. This, says Raymond, was felony: First, Because he should be said to have taken these goods with a felonious intent; for the act subsequent, viz. his running away with them, explained his intent precedent. Secondly, Because, although the goods were delivered, yet they were not out of the owner's possession by the delivery till the property was altered by the perfection of the contract; which was but inchoate, and never perfected between the parties: and when the prisoner ran away with the goods, it was as if he had taken them up lying in the shop, and had ran away with them. It would bring great contempt on the justice of the nation, as Hawkins somewhere observes, if its laws could be evaded by such tricks and contrivances as these. But if credit

Ante, 677. Post. s. 112. *Vide* Abraham Chisser's case, T. Ray. 275.

Post. s. 110.

Ch. XVI. § 106. credit be given for the property for ever so short a time, no felony can be committed by converting it.

Property or possession passing by delivery on discounting incomplete.

So where the delivery is by way of pledge or security, the property in the thing pledged remains in the owner, and therefore larceny may be committed of it, if such delivery were obtained fraudulently and with intent to steal.

§ 107. *By way of pledge or security.*

Patch's case, O. B. Feb. 1782, cor. Gould J. Perryn B. and Buller J. MS. Buller J. & 2 MS. Sum. 227. (S. C. 1 Leach, 273.)

Pretending to find a jewel, in which the prosecutor as present at the time was to share, and inducing him to take charge of it, and to deposit with the finder his watch, &c. until the latter should redeem the jewel by paying a certain sum of money; and this done with intent to steal the watch, &c.: Held larceny.

John Patch was indicted for stealing a silver watch, gold seal, &c. and 7*s.* the property of J. Bumstead. The prisoner and two others joined Bumstead in a street in London, and after walking a little way with him, one of them stooped down and picked up a purse which contained a ring, and a receipt for 147*l.*, purporting to be the receipt of a jeweller for a rich brilliant diamond ring. The prisoner proposed that they should go into a public house, which they accordingly did, to consider in what manner the prize should be divided amongst them. After various proposals the prisoner at length asked the prosecutor if it would be agreeable to him to take the ring into his own possession, and to deposit his money and watch, which he had before interrogated him about, as a security to return it upon receiving his portion of its value. The prosecutor assented, and signed a written agreement, dictated by the prisoner; that when the prisoner or either of the two other men returned the watch and money and 70*l.* he would re-deliver to them the purse and the ring. The prosecutor accordingly laid the watch and money mentioned in the indictment on the table, and received the ring. The prisoner beckoned the prosecutor out of the room upon pretence of speaking to him in private, and in the mean time the other two men went off with the property. Their abrupt departure alarmed the prosecutor, but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he should have his watch and money again; and when the prisoner was apprehended, he wanted to make it up. The ring was valued at 10*s.* It was objected that this amounted only to a fraud. But the Court, upon the authority of Pear's case, referred it to the jury to consider, Whether the whole transaction were not a preconcerted scheme feloniously to obtain the prosecutor's property? and Gould J. who tried the prisoner, left it to the jury, Whether

Post. 687.

Whether the prisoner and the other two men were not all in concert together to procure by such a pretext any man's property whom they might meet, and to embezzle it; which in plain words was to steal it? The jury found the prisoner guilty, and he was sent to the Thames for three years. The opinions of the three Judges who presided at the trial were founded on this, that the possession was obtained by fraud, and the property not altered; for the prosecutor was to have it again. And therefore it was not like the case of goods sold on credit, where the buyer means immediately to convert them into money, and is not able nor intends to pay for them; for there the buyer gets the absolute property by the act and consent of the owner.

Ch. XVI. § 107. *Property or possession passing by delivery on pledge.*

The distinction, between parting with the *property* or with the *possession* only, was very much considered in another case of one Humphrey Moore, who was indicted for stealing 20 guineas and four doubloons of John Field. A stranger joined company with the prosecutor in the street, and soon after picked up a purse containing a ring and a receipt for 210*l.* as for a brilliant diamond ring. He persuaded the prosecutor to go into a public house with him, telling him he was entitled to half; and while he was looking at the ring there, the prisoner entered the room, inquired into the matter, and offered to settle it between them. The stranger said he had bills to a large amount due the next day, but no money about him. Moore then inquired of the prosecutor what money he had got, who answered 40*l.* or 50*l.* at his lodgings at Chelsea. Moore thereupon proposed going there, which they did; and after getting the money, they went to a public house in the neighbourhood, where the prosecutor put down 20 guineas and four doubloons; which the stranger in Moore's presence took up and carried away, leaving the ring with the prosecutor; and having first appointed to meet him the next day, when he was to return the 20 guineas and four doubloons, and give the prosecutor 100*l.* for his share of the ring, which was then to be restored to him. Moore was also appointed to be there; and the prosecutor and the stranger were to give him a guinea each for his trouble. The prisoner and the stranger went away together, and the prosecutor saw no more of them either at the place appointed

Moore's case, O. B. Ap. 1784, MS. Gould and Buller Js. and 2 MS. Sum. 228. (S. C. 1 Leach, 354.) *Inducing one to deliver 20 guineas and 4 doubloons by way of pledge for the return of a counterfeit jewel pretended to be found, and of which the party was to have half the value on his returning it, and receiving from the prisoner the 20 guineas, &c. again, and this done with intent to steal the money, &c. held larceny.*

or

Ch. XVI. § 107. *Property or possession passing by delivery on pledge.*

or elsewhere till the prisoner was taken up. The ring was of small value. On these facts the jury were of opinion that the prisoner was confederated with the stranger, for the purpose of obtaining money on the pretence of sharing the value of the ring: that in the manner and by the means above stated he aided the stranger to obtain the money of the prosecutor: and they found him guilty, subject to the opinion of the Court, Whether the offence amounted to felony? In November term 1784 all the Judges (except Lord Mansfield) met to consider this case; and all of them, except Lord Loughborough and Lord C. B. Skynner, held the prisoner guilty. The majority thought that the money and the doubloons were delivered as a pledge, and not as a loan: so that though the possession were parted with, the property was not; more especially as to the doubloons, which the prosecutor clearly understood were to be returned the next day in specie. The prisoner therefore having obtained them with a fraudulent intent to apply them to his own use, it was felony from the intention with which he gained the possession: and he and his companion acting in concert together were equally guilty. The other two Judges differed on the fact, that the prosecutor had parted with the *property*. They thought the doubloons were to be considered as money; and that the whole was a loan on the security of the ring. And that when money was delivered by a man on such an occasion it was not in his contemplation to have the same identical money back again. But they admitted the rule as laid down by the other Judges from the cases of R. v. Patch, Rex v. Pears, and other cases which were there cited.

Watson's case, O. B. Dec. 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 730.)

Pretending to find a valuable jewel, and offering to go halves with another, and on that pretence obtaining from her in her own house notes of 100l. value, which were to be deposited in the

John Watson was convicted of stealing several bank notes, value 100*l.* in the dwelling-house of John Smith, the same being the property of the said J. S., and the money then due, &c. against the statute, &c. The prosecutor's wife proved that as she was going along the street she saw the prisoner stoop down and pick up a small parcel. He said he had got a prize. She cried "Halves," and said it was usual to give half of what was found. They went together into St. James's Park, where they examined the parcel in the presence of another man (who appeared to be an accomplice of the prisoner's,) and found in it a locket with a large stone, and

Ch. XVI. § 107.

Property or possession passing by delivery on pledge.

and a paper purporting to be the receipt of a jeweller for 250*l.* for a diamond locket. The prisoner said his name was Smith, that he was the captain of a ship, and that he would go to a friend's house, where his cargo was, and bring 100*l.* towards paying the witness her share. He was accordingly absent about fifteen minutes, and returned saying that his friend was not at home. After making another pretence to go to the King's jeweller in Bond-street, which the prisoner at last evaded, they all proceeded to the witness's house in Mortimer-street, which they entered; the prisoner having first enquired who was at home, and been informed that only the witness's daughter was there. The witness then got 100*l.* in bank notes, and laid them on the table. It had been before agreed between them, that the locket should be left in her custody, and that she should *deposit* 100*l.* in the prisoner's hands *as a security* to return him the locket the next morning; at which time *she was to receive from him half the value of the locket*, as mentioned in the receipt found; *and she was to have the* 100*l. deposited in the prisoner's hands as such security as aforesaid returned back.* The prisoner took up the bank notes laid on the table, said they were right, and that he would call the next morning and settle the whole; and after delivering up the locket, went off with the notes, and never returned again. The locket was of the trifling value of 5*s.* 6*d.* The prisoner was convicted of the simple felony in stealing the notes; but a case was reserved for the opinion of the Judges, upon an objection taken that this was only a fraud and not a felony. In Hilary term 1795 all the Judges held the conviction proper for the simple felony; but not for the stealing in the dwelling-house, (as it was at first supposed that the verdict had been taken.) For they thought, as to the capital part of the charge, that as the notes were in possession of the prosecutrix, and derived no protection from the house, the case did not fall within the statute 12 Ann. c. 7.

prisoner's hands till the next day as a security for the jewel which was to be left in her custody then, and returned to the prisoner upon his returning back the deposit and paying the prosecutrix 125l. half of the supposed value of the jewel, which was a counterfeit; amounts to felony of the notes so received; but not capital, as for a larceny in the dwelling-house of more than 40s. the notes being in the possession of the prosecutrix and deriving no protection from being in the house.

§ 108.

Different sorts of possession.

Where it is out of dispute that the *property* remains in the original owner, and the only question is, Whether he did not so far part with the *possession* of the thing taken as to exclude the idea of any trespass in the taker, without which

Ch. XVI. § 108. *Different kinds of possession.*

these offences cannot be committed; it is material to examine in what manner such possession was in fact parted with; whether by way of charge, general bailment, or delivery for a special purpose. For I think it may now be laid down as general rules; First, That where notwithstanding a delivery by the owner in fact, the legal possession remains exclusively in him, larceny may be committed exactly the same as if no such delivery had been made. Secondly, That where by the delivery a special property, and consequently a legal possession, apart from any felonious intent, would be transferred; there, if it be found that such delivery were fraudulently procured with a felonious intent to convert the property so acquired; then also the taking amounts to larceny. Thirdly, That even where there is no evidence of a previous felonious intent in so obtaining the property, but it is acquired upon a privity of contract, still larceny may be committed after any act done to determine such privity of contract.

General rules as to delivery by way of charge, general bailment, or for a special purpose.

§ 109. *Possession by way of charge, or special use.* Ante, s. 14.

If the person to whom goods are delivered has but the bare charge or custody of them, the legal possession remains in the owner, and the other may commit larceny by a fraudulent conversion of them to his own use. This rule I have before shewn to hold most expressly in the case of servants entrusted with the care of goods in the possession of their masters. The only doubt which had any foundation in respect to such persons was where the master had no previous possession of the property distinct from the actual possession of the servant; but that difficulty has been removed by the stat. 39 Geo. 3. c. 85. before referred to. The same rule applies to him who has a bare special use of goods; as in the case of a guest in the owner's house: for none of these persons have properly speaking the possession. So if a weaver or silk throwster deliver yarn or silk to be wrought by journeymen in his house, and they carry it away with intent to steal it, it is felony; for the entire property remains there only in the owner, and the possession of the workman is the possession of the owner. But if the yarn had been delivered to a weaver out of the house, and he having the lawful possession of it had afterwards embezzled it, this would not be felony; because by the delivery he had a special property, and not a bare

2 MS. Sum. 230, 231, 3. Sum. 61. Owen, 52. Moore, 248. Crompt. 25. a. b. Bro. Coron. 160. MS. Tracy, 60. 1 Hale, 506. 667. 1 Hawk. ch. 33. s. 6. Poph. 84. Staundf. 25. Ante, 574.

O. B. Oct. 1664. Kel. 35. Staundf. 25. a. 21 H. 7. 14.

Sum. 62. and MS. Sum ut supra. 1 Hawk. ch. 33 s. 3.

bare charge; in the same manner as one who is entrusted with the care of a thing for another to keep for his use. Ch. XVI. § 109. *Possession by way of charge or use.*

If a merchant's or banker's clerk have access to the money room upon special occasions, or be sent to the drawer for money for a special purpose; or if he be sent to bring money generally out of the drawer; and at the time he take the opportunity of purloining money for his own use; he is as much guilty of felony as if he had no allowed access to it whatever. This was not denied in Bazeley's case, and therefore needs not the aid of the stat. 39 Geo. 3. c. 85. Murray's case, O. B. Oct. 1784, cor. Ld. Loughborough, Sess. Pap. p. 1290. Ante, 571.

§ 110. *Possession in owner's presence for special purpose.*

It is worthy of consideration whether the above-mentioned distinction, concerning the legal possession remaining in the owner after a delivery in fact to another, do not extend to all cases where the thing so delivered for a special purpose is intended to remain in the presence of the owner. For in such case the owner cannot be said to give any credit to or repose confidence in the party in whose hands it is so in fact placed; and the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person to whom it is so delivered has at most no more than a bare limited use or charge, and not the legal possession of it. In this respect the case differs from a delivery upon a contract, whereby a special property is transferred, and consequently a distinct possession. This was one of the grounds on which Chisser's case was put by Raymond B. The goods which had been delivered there by the tradesman to the customer to look at were not, says Raymond, out of the owner's possession by the delivery (*a*), till the property was altered by the perfection of the contract. And this was mentioned by some of the Judges on the conference on Pear's case in 1779, as a matter proper for consideration, Whether cases of that description, and amongst others the case of the porter before Lord Holt, which will be mentioned presently, were not governed by the principle, that the legal possession still remained in the owner of the goods notwithstanding the delivery, he continuing present? though others thought that too refined, as setting up a legal fiction against the fact, which ought never to be done in Crompt. 25. a. H. 21 H. 7. 14. 1 Hale, 505. n. f. Ante, s. 106. Post. s. 112. Post. s. 115.

(*a*) Ld. C. B. Skynner was of the same opinion at the conference on Pear's case, in 1779.

criminal

Ch. XVI. § 110. criminal cases. Yet this fiction, such as it is, is generally admitted to exist in the case of servants, and even in the case of other persons having a special use of goods in the owner's house: the best reason for which, as it appears to me, is the presumed presence and superintendence of the owner. And it does not seem more unreasonable to consider goods in the actual presence of the owner, out of his house, as being in his legal possession, though put into another's hands for a particular purpose, than if such goods were delivered to another for the like purpose in the owner's house during his absence. Upon this ground too Mr. Justice Burnet puts the case of the owner in a fair delivering his horse to another to try his paces, and other cases of the like sort; where, if the party run away with the property, it is felony: for, says he, the owner only delivered it for trial and present use, and not by way of parting with the possession: *for goods in the presence of the owner are in law in his possession still, though he permit an use to another.* But indeed most of these cases fall within the scope of another less disputable principle; namely, that if the possession be obtained with a felonious intent; in other words, with a fraudulent intent to convert the property to the taker's own use without account, though by the delivery of the owner, it amounts to felony.

Possession in owner's presence.

Crompt. 25. a.

MS. Burnet, 61.

§ 111. This brings me to the consideration of the two other species of possession, upon a general or special bailment, which I shall consider together; and herein there are three subjects of inquiry:

Upon a general or special bailment.

1. What is a bailment.
2. With what intent the thing is taken by the bailee.
3. By what acts the bailment is determined.

What a bailment. 1. Having already touched upon the difference between a charge and a bailment, it remains only to consider what acts are sufficient to amount to a delivery. A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A., with intent to steal them; this is felony: because, says Lord Hale, the goods were not delivered to him, but taken by him. This may be so where by such delivery of the key it is not in the contemplation of the parties to make

1 Hale, 505. Staundf. 25.

make a delivery of the goods contained in the room; as if it be delivered upon any other special occasion. But if the key be delivered for the purpose of entrusting the party with the care of the goods, I cannot see but that it is as much a delivery of the goods themselves, as if each article had been put by the owner into the hands of the party. And then, although the taking of such goods out of the room with a fraudulent intent to convert them might still be felony, yet it would be so on another ground; because by the act of taking the goods with such intent out of the room where they were intended to remain for safe custody, the privity of the contract would be determined in the same manner as if they had been delivered in a box and taken out of it afterwards. Nor do I find any ground for making a distinction between a delivery of goods in criminal and in civil cases; at least no such distinction appears to exist at common law.

Ch. XVI. § 111. *On bailment.*

Vide Ellis v. Hunt. 3 T. Rep. 468.

§ 112.

2. Upon the second point: It is peculiarly the province of the jury to determine with what intent any act is done; and therefore, though in general he who has a possession of any thing on delivery by the owner cannot commit felony thereof; yet that must be understood, first, where the possession is absolutely changed by the delivery, which I have before considered; and next, which is the present object of inquiry, where such possession is not obtained by fraud, and with a felonious intent. For if, under all the circumstances of the case, it be found that a party has taken goods from the owner, though by his delivery, with an intent to steal them, such taking amounts to felony; it being granted that there is evidence to warrant such a conclusion in point of fact. I cannot illustrate this subject better than by a full and accurate account of a case which was much discussed by the Judges. John Pear was indicted for stealing a black mare, the property of Samuel Finch. On the 2d July 1779 the prisoner hired the mare of Finch, who lived in London, for that day, in order to go to Sutton in Surry, and told him that he should return at eight o'clock the same evening. Finch, before he let the prisoner the mare, inquired of him where he lived, and whether he were a housekeeper: to which he answered, that he lived at No. 25 in King-street, and was only

Taking goods by delivery of owner with felonious intent.
Sum. 61.
1 Hale, 504. &c.
2 MS. Sum. 239.

Pear's case, O. B. Sept. 1779, MS. Buller J. (S. C. 1 Leach, 253.)

Hiring a horse on pretence of taking a journey, but in truth with intent to steal it, and evidencing such felonious intent by immediately selling.

Ch. XVI. § 112 *Taking on bailment with felonious intent.*

ing the horse as soon as the party obtaine! possession of it, is larceny.

only a lodger. The prisoner not returning as he had promised, the prosecutor went the next day to inquire for him according to the direction he had given; but no such person was to be found. It turned out that the prisoner had in the afternoon of the same 2d of July sold the mare in Smithfield. In summing up this evidence to the jury, Mr. Justice Ashhurst, who tried the prisoner, told them, that if they were of opinion that the prisoner hired the mare with an intent of taking the journey mentioned, and afterwards changed that intention; then, as she was sold whilst the privity of contract subsisted, they ought to acquit the prisoner. But if they were of opinion that the journey was a mere pretence to get the mare into his possession, and that he hired her with an intention of stealing her; they ought to find him guilty: and he would save the point for the opinion of the Judges. The jury found the prisoner guilty. This case underwent a great deal of discussion: and the Judges delivered their opinion seriatim upon it, on the 4th February 1780, at Lord C. J. De Grey's house: and on the 22d of the same month. Mr. Baron Perryn delivered their opinion at the O. B. as follows (*a*). (After stating the indictment, evidence, and finding of the jury as above stated,) This case has been maturely considered by all the Judges, and eleven (*b*) of them, who met for the purpose, delivered their opinions at large upon the subject: seven of them held the offence to be a clear felony; two of them were of opinion that it was not felony; and the other two entertained great doubts at the last; which doubts were founded upon two statutes which he should take notice of. Three out of the four dissenting Judges agreed with the seven, that by the principles of the common law this was felony. But the doubts and opinions of those four Judges were founded chiefly on the statutes 33 H. 8. and 30 G. 2. against obtaining goods by false tokens or false pretences. Two of the Judges thought that as the delivery of the mare was obtained from the owner by means of asserting that which was false, viz. that the prisoner

Vide post. tit. Cheats.

(*a*) This judgment was settled and approved by several of the judges before it was delivered.

(*b*) Mr. Justice *Blackstone*, the other judge who was absent on account of illness, always held that it was felony.

wanted

wanted to go a journey which he never intended to take at all; and as the two statutes before mentioned had made the offence of obtaining goods by false tokens or false pretences, punishable as a misdemeanor only; and the stat. 33 H. 8. had distinguished the case of obtaining goods by false tokens from the case of obtaining goods by stealth; they were bound by those statutes to say, that the prisoner's offence was not felony. One of them also held that this was not felony by the common law; because there was no actual taking of the mare by the prisoner. But ten out of the eleven Judges held it to be clear that the offence would have been felony by the common law, if the statutes had never existed: and seven of them held that it was not within or at all affected by the statutes of H. 8. or Geo. 2. That larceny was defined by Lord Coke to mean a felonious and fraudulent taking and carrying away of the goods of another. But it was settled by old authorities, that the taking need not be by force. If a carrier or porter received goods to carry from one place to another, and he opened the pack and sold them; that was felony: yet in that case there was no taking by force, but on a delivery by the owner. That the reason assigned for the determination in Kel. 82. was because the opening and disposing of them declared that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them. So if A. cheapened goods of B.'s and B. delivered them to A. to look at, and A. ran away with them; this was felony by the apparent intent of A. T. Ray. 276. Kel. 82. So if a horse were upon sale, and the owner let the thief mount him in order to try him, and the thief rode away with him, it was felony. Kel. 82. So in the case of one Tunnard, tried at the O. B. in October Sessions 1729, who was indicted for stealing a brown mare of Henry Smith's: and upon the evidence it appeared, that Smith lived in the Isle of Ely, and lent Tunnard the mare to ride three miles; but he, instead of riding three miles only, rode her up to London and sold her: this was holden to be felony. And Lord C. J. Raymond, who tried the prisoner, left it to the jury to consider, Whether Tunnard rode away with her with an intent to steal her? and the jury found him guilty. That here the same directions were given

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

Post. s. 113.

Tunnard's case, O. B. 1729.

Denton J. and Hale B. assisted. MS. *vide* post.

to

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

to the jury by the learned Judge who tried the prisoner, and the jury had given the same verdict. That even in the case of burglary, which the law defined to be the breaking into a house in the night time with intent to commit felony, if a man procured the door of a house to be opened by fraud, and by that means entered into the house through the door-way without any actual breaking, it had been adjudged to be burglary. That in all these cases the intention was the thing chiefly regarded, and fraud supplied the place of force. That what was the intention was a fact, which in every case must be left upon the evidence to the sound judgment of a jury. And in this case the jury had found that at the time when the prisoner obtained the possession of the mare, he intended to steal her. That the obtaining the possession of the mare, and afterwards disposing of her in the manner stated, was in the construction of law such a taking as would have made the prisoner liable to an action of trespass at the suit of the owner, if he had not intended to steal her. For she was delivered to the prisoner for a special purpose only, viz. to go to Sutton, which he never intended to do, but immediately sold her. That in this light the case would be similar to what was laid down by Lyttleton, s. 71, who says, "If I lend to one my sheep to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have trespass notwithstanding the lending." That if in such a case trespass would have lain, there could be no doubt but that in this case, where the felonious intent at the time of obtaining the possession was found by the jury, that it was felony by the common law. That ten of the Judges out of the eleven, therefore, were of opinion, that if a person obtained the delivery of a thing by fraud and falsehood, intending at the time that he so obtained the delivery to steal it; upon the principle of the common law and the adjudged cases which had been mentioned, if the statutes had not existed, his offence would be felony (*a*). That the next question was, Whether this offence were within

(*a*) On the debate of this case, Ashhurst J. said, "Wherever there is a real and bonâ fide contract and a delivery, and afterwards the goods are converted to the party's own use; that is not felony. But if there be no real and bonâ fide contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit felony."

or

or at all affected by the statutes of H. 8. and Geo. 2. (*a*). Seven of the Judges were of opinion, that it was not. That the stat. of Hen. 8. was confined to the cases of obtaining goods *in other men's names, by false tokens or counterfeit letters*, made in any other man's name. The stat. of Geo. 2. extended that law to all cases where goods were obtained *by false pretences* of any kind. But both these statutes were confined to cases where credit was obtained in the name of a third person; and did not extend to cases where a man, on his own account, got goods with an intention to steal them. That besides, the seven Judges held that neither of those statutes were intended to mitigate the common law, or to make that a less offence which was a greater before. On the contrary, the Legislature, by those statutes, meant to inflict a severer punishment in the cases of fraud than the common law had done. That in many cases it was extremely difficult, and sometimes impossible to prove what the offender's original intention was. The circumstances evidencing a felonious intent, or the contrary, were so various, that Hale (509) says it is impossible to prescribe them: they must be left to the consideration of a Judge and jury. That where an original felonious intent appeared, the statutes did not apply. Where no such intent appeared, if the means mentioned in the statutes were made use of, the Legislature had made the offender answerable criminally, who before by the common law of the land was only answerable civilly. That in the prisoner's case the intention was apparent, and the jury had rightly found that it was felonious. The crime then was felony, and of a nature which the statute law had made punishable with death.

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

George Charlewood was indicted before Gould J. and Perryn B. for stealing a gelding of John Houseman. The prose-

R. v. Charlewood, O. B. Feb. 1786, cor. Gould J. and Perryn B. 1 Leach, 456. Sess. Pap. No. 200. S. C.

(*a*) On the debate in this case Eyre B., adverting to these statutes, said he doubted if there were not a distinction in this respect between the owner's parting with the possession and with the property in the thing delivered. That where goods were delivered upon a false token, and the owner meant to part with the *property* absolutely and never expected to have the goods returned again, it might be difficult to reach the case otherwise than through the statutes; aliter, where he parted with the *possession* only: for there if the possession were obtained by fraud, and not taken according to the agreement; it was on the whole a taking against the will of the owner; and if done animo furandi, it was felony. MS. Buller J.

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

cutor was a livery stable keeper in Crown Street, St. Ann's, Soho; and on the 4th October 1785 was applied to by the prisoner, a post-boy, for a horse, in the name of a Mr. Ely, saying that there was a chaise going to Barnet, and that Mr. Ely wanted a horse for his servant to accompany the chaise and return with it. The horse was accordingly delivered to the prisoner by the prosecutor's servant about nine o'clock in the morning. The prisoner mounted him, and on going out of the yard, said, he was going no further than Barnet. He accordingly proceeded towards Tottenham Court Road, which led to Barnet, and also, though in some degree circuitously, to Mr. Ely's house. Between three and four o'clock in the afternoon of the same day the prisoner sold the horse in Goodman's Fields for a guinea and a half, including the bridle and saddle. The horse was much injured, and appeared to have been rode very hard. The purchaser almost immediately sold his bargain for 2*l.* 15*s.* The Court observed to the jury that the Judges in Pear's case under similar circumstances with the present had determined that if the jury were satisfied under all the circumstances, that a person, at the time he obtained another's property, meant to convert it to his own use, it was felony. That there was a distinction, however, to be observed in this case, though it was so nice that it might not be obvious to common understandings; for that if they thought that the prisoner, at the time he hired the horse for the purpose of going to Barnet, really intended to go there, but finding himself in possession of the horse, afterwards determined to convert it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. That there was yet another point for their consideration; for although the prisoner really went to Barnet, yet being obliged by the contract to re-deliver the horse to the owner upon his return to London; if they thought that he performed the journey, and returned to London (*a*); and after such return, instead of delivering it to the owner, converted it to his own use, he was thereby guilty of felony; for the end and pur-

Obtaining a horse by pretending that another person wanted to hire it to go to B., *but in truth with intent to steal it; and not going to* B., *but taking the horse elsewhere and selling him, held larceny.*

Ante, 685.

(*a*) *Quære?* For part of the contract was *to return the horse to the owner in London*; and therefore the contract, if genuine and valid in the first instance on the part of the prisoner, would subsist after his mere return to London.

pose

pose of hiring the horse would be then over. The jury found the prisoner guilty on the first point, that at the time he hired the horse he intended to steal it: and he was afterwards executed.

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

Major Semple was indicted for larceny of a post-chaise; and the following facts appeared. The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood, and had before hired a carriage of the prosecutor, for which he had paid. On the 1st of September 1785, the prisoner, who then passed by the name of Major Harrold, hired the chaise in question of the prosecutor, saying that he should want it for three weeks or a month, as he was going a tour round the North; and it was agreed that he should pay at the rate of 5*s.* a-day during that time; and a price of 50 guineas was talked about in case he should determine to purchase it on his return to London, which was suggested by the prisoner; but no agreement took place on the subject of the purchase. In a few days afterwards the prisoner took the chaise from Mr. Lycett's with his own horses; and it was in evidence that he was driven in it from London to an inn at Uxbridge, where he ordered a pair of horses, and went from thence to Bulstrode, and returned to the same inn, where he took fresh horses; but where he went with the chaise afterwards did not appear. No tidings were obtained of him till a year afterwards, when he was apprehended on another charge. It was attempted to distinguish this from Pear's case and Aickles' case, inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them: but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was hired generally for three weeks or a month, and not to go to any certain place: for the mere understanding that it was for the purpose of making a tour round the North made no part of the contract. During that time, therefore, he had a complete dominion over it, and the legal possession; and therefore a tortious conversion pending the contract would not be felony. Besides there was no evidence of a tortious conversion;

Major Semple's case, O. B. Sept. 1786, cor. Gould J. and Adair Serjt. Rec. Sess. Papers No. 671. (2 Leach, 470. S. C.)

One obtains possession of a chaise under pretence of hiring it for three weeks or a month, suggesting his intention to go on a tour, and he departs with it, and is not heard of for a year afterwards, when he is apprehended: and then he gives no account of the chaise: Held evidence from whence the jury may infer that he originally took it under the pretence of a hiring with intent to steal it.

Ante, 685.
Ante, 675.

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

conversion; for *non constat* that the prisoner had disposed of the chaise. The Court, however, said that it was now settled that the question of intention was for the consideration of the jury: and that in the present case, if they should be of opinion that the original taking of the chaise was with a felonious intent to steal it, and the hiring a mere pretence to enable him to effectuate that design, without any intention to restore or pay for it, it would fall precisely within the principle of Pear's case, and the other decisions which had been made; and the taking would amount to felony. For if the owner only intended to give the prisoner a qualified use of the chaise, and the prisoner had no intention to make use of that qualified possession, but to convert it to his own use, he did not take it upon the contract, and therefore did not obtain the lawful possession of it: but if there were a *bonâ fide* hiring, and a real intention of returning it at that time, the subsequent conversion of it could not be felony; for by such contract and delivery the prisoner would have acquired the lawful possession of the chaise; in which case his subsequent abuse of that trust would not be felony. That as to there being no proof of actual conversion in this case, it was not necessary; but the jury must judge of it from the circumstances. If the prisoner had staid out six weeks, or two months, and on his return had offered to restore the chaise to the owner, or to pay him for it, such a conduct would have been evidence of an honest intention at the time of the hiring: but there was no account given of it, even up to that moment: that therefore raised a presumption against the prisoner which it was incumbent on him to repel: and if he could not, the jury would have to consider from all the facts in proof, Whether the taking were with a felonious intent or not. If it were, the case fell directly within the principle which governed that of Pear's, from which it could not be distinguished. A case was also then mentioned as having been determined very lately by the Judges, where a man ordered a pair of candlesticks from a silversmith to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels, by a servant; and the prisoner contriving to send the servant back under some pretence, kept

kept the goods (*a*): and that was ruled to be felony; although they were delivered with the bill of parcels; such delivery being made under an expectation by the owner of being paid the money: for the jury found that it was a pretence to purchase with intent to steal. Finally, the question of intention being left to the jury in the principal case, they found the prisoner guilty; and he received sentence of transportation for seven years.

Ch. XVI. § 112. *Taking on bailment with felonious intent.*

Ante, s. 106.

§ 113. *Review of the above cases.*

I have been thus particular in stating the above cases, because they contain nearly the whole of what can be said on the subject. It is to be collected from them, that if a person obtain the goods of another by a lawful delivery without fraud, although he afterwards convert them to his own use, he cannot be guilty of felony. As if a taylor have cloth delivered to him to make cloaths with; or a carrier receive goods to carry to a certain place; or a friend be entrusted with property to keep for the owner's use; which they afterwards severally embezzle. So if plate be delivered to a goldsmith to work or to weigh, or as a deposit, his conversion of it will not be felony. But if such delivery be obtained by any fraud or falsehood, and with an intent to steal; though under pretence of a hiring, or even a purchase; if in the latter case no credit were intended to be given; the delivery in fact by the owner will not pass the legal possession so as to save the party from the guilt of felony. But if the property were intended to pass by the delivery, there can be no felonious taking.

1 Hale, 504. MS. Burnet, 61. Staundf. 25. a. 1 Hawk. ch. 33. § 3.

1 Show. 50. Kel. 82.

§ 114. *Privity of contract determined.*

3. I come now to the last consideration, which I have before slightly touched upon; by what acts the privity of contract is determined, so as to make the taking of the party with a felonious intent a new taking and trespass, even after a lawful delivery by the owner. It has been before stated in the case of the delivery of a horse upon hire or the like, that if the delivery be obtained *bonâ fide*, no subsequent wrongful conversion, pending the contract, will amount to felony. But even in such case if the hiring be limited to a particular

1 Hale, 504.

Per Lord Raymond, at Exeter, 10 Geo. 1. Chapple's MS. 2 MS. Sum. 233.

(*a*) It must be understood that the prisoner ran away with them, or did some other act to denote an intention of withdrawing himself from any account for them; and that no credit was intended to be given to him; but that it was meant as a sale for ready money only. *Vide* Edwards's case, ante, s. 106.

Ch. XVI. § 114. *After privity of bailment determined.*

particular time or place, and after that time be expired, or the party arrived at the proper place of re-delivery, he ride away with the horse, and convert it to his own use, it will then be felony. For as was said by Gould J. in Charlewood's case, the end and purpose of the hiring, for which the delivery was made, would be then over. And as it has been before shewn that the legal possession follows the right of property, as soon as the special property of the holder is determined, the legal possession reverts to the original owner, in the same manner as if there had never been any precedent delivery; after which any new taking by the party for his own use will in point of law be a trespass; and if it be done with a felonious intent to steal, of which the jury are to judge, will amount to felony. In Tunnard's case, which has been mentioned before, where he had borrowed a horse in the Isle of Ely to ride three miles, instead of which he had ridden the horse up to London and sold it; Raymond C. J. Denton J. and Hale B. held it felony; because the privity was determined after he had ridden further than the agreement warranted: but if there had been no such agreement, the privity would have remained, and the riding away would have been no felony: and the C. J. who tried him having left it to the jury to consider, Whether the prisoner rode away with the horse with intent to steal it, they found him guilty.

Ante, 691.

Ante, 687.

Serjt. Forster's MS.

Perhaps the circumstances of that case would have warranted the finding of the jury, that the original hiring was a mere pretence to steal the horse, and therefore that the original taking was felonious. At any rate these cases proceeded upon an express limitation as to time or use of the lawful possession of the bailee, and a subsequent unlawful conversion with intent to steal, taken up after the determination of such prior lawful possession.

Leigh's case, Well's Sum. Ass. 1800, cor. Lord Eldon, MS. Jud. *Where the jury found that one who assisted in taking another's goods from a fire in his presence but*

Elizabeth Leigh was indicted at Wells assizes, in the summer of 1800, for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, consisting of a shop containing muslin and other articles mentioned in the indictment, was on fire; and that his neighbours had in general assisted at the time in removing his goods and stock for their security. The prisoner probably had removed all the articles which she was charged with

with having stolen when the prosecutor's other neighbours were thus employed. And it appeared that she removed some of the muslin in the presence of the prosecutor and under his observation, though not by his desire. Upon the prosecutor's applying to her next morning, she denied that she had any of the things belonging to him; whereupon he obtained a search warrant, and found his property in her house; most of the articles artfully concealed in various ways. The jury found her guilty: but it was suggested that she originally took the articles with an honest purpose, as her neighbours had done, and that she would not otherwise have taken some of them in the presence and under the view of the prosecutor; and that therefore the case did not amount to felony. The jury were instructed, that, Whether she took them originally with an honest intent was a question of fact for their consideration; that it did not necessarily follow from the circumstances mentioned, that she took them with an honest intent. But even if they were of that opinion, yet that her afterwards hiding the goods in the various ways proved, and denying that she had them, in order to convert them to her own use, would still support the indictment. The jury found her guilty; but said, that in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And upon reference to the judges, in Michaelmas term 1800, all (absent Lawrence J.) held the conviction wrong: for if the original taking were not with intent to steal, the subsequent conversion was no felony, but a breach of trust.

Ch. XVI. § 114. *After privity of bailment determined.*

without his desire, and who afterwards concealed and denied having them, yet took them honestly at first, and that the evil intention to convert them came on the taker afterwards; held no larceny.

There are however some tortious acts before the regular completion of a contract, on which goods are delivered, which may determine the privity of it, and amount in law to a new taking from the possession of the owner. This principle furnishes the well-known distinction in the carrier's case (*a*), which seems to stand more upon positive law, not now to be questioned, than upon sound reasoning.

§ 115. *By tortious conversion pending the contract.*

If a man deliver goods to a carrier to carry to a certain place, and he carry them away, it is no felony: otherwise, i.

1 Hale, 504. 1 Hawk. ch. 33. s. 5. 7. 3 Inst. 107.

(*a*) Admitted to be law in all the cases where the question has been canvassed.

he

Ch. XVI. § 115. *By tortious conversion pending bailment.*

he have a bale or trunk with goods delivered to him, and he break the bale or trunk, and take and carry away the goods with intent to steal them. So if he carry the whole pack to the place appointed, and then carry it away with intent to steal it; this is a felonious taking by the book of 13 Ed. 4. 9. for the delivery had taken effect, and the privity of the bailment was determined. But that must be intended, says Lord Hale, where *he carries them to the place, and delivers or lays them down;* for then his possession by the first delivery is determined, and the taking afterwards is a new taking.

Staundf. 25. 1 Bac. Abr. 557. 4 Blac. Com. 230. 2 MS. Sum. 233.

It appears at first sight absurd to say, that if the carrier never carry the package to the place appointed, but sell the whole, it shall not be felony; but that if he take out a part of the goods only, it shall be so. Yet the distinction is well settled; for the carrier is trusted with the carriage of it in that condition; and if the package be lost, stolen, or taken, he is answerable; and therefore his conversion is a breach of trust for which the owner may recover the value of the whole in damages. But to constitute larceny there must be an unlawful taking and trespass; and up to the moment of his parting with the whole package his possession is lawful, and he has no unlawful possession afterwards whereby to constitute a new taking, unless he break the package, or sever part of the commodity from the rest while it continues in his possession.

Kel. 81, 82. 13 Ed. 4. 9.

It is true that Kelynge, in mentioning this case of a carrier who took goods to another than the appointed place, where he opened the packs, and took all the goods and converted them, which was ruled to be felony, puts the principle of the determination on a far different footing: not as it is stated in other books because the privity of the bailment was thereby determined, but *because his subsequent act of carrying the goods to another place, and there opening and disposing of them to his own use, declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them.* There may indeed be evidence of such a previous intent, sufficient to warrant such a conclusion in point of fact: and whether the particular evidence in that case were of such a nature does not appear: but if that inference may be drawn from the

Vide 4 Blac. Com. 230.

mere

mere fact of the carrier's embezzling the goods, there is an end of the distinction at once as to the case of breaking the package and taking out the goods. For if the taking of part of the goods out of the package be evidence of the carrier's having originally intended to take the goods, not upon the agreement, but with intent to steal them, *a fortiori* the taking the whole package of goods itself, whether broken or not, and converting it, must be evidence of such an intent: and so indeed Kelynge himself admits. The same reason is also adopted in the judgment on Pear's case; but it is quoted from Kelynge, and must stand on his authority. But all other writers, as far as I can find, have put this case upon the same footing as Lord Hale; namely, that the privity of contract is determined by the act of breaking the package which makes him a trespasser; in which case the taking the whole, or a part of the contents, makes no difference, as some have supposed.

Ch. XVI. § 115. *By tortious conversion pending bailment.*

Kel. 83.

Ante, 687.

Post. 698.

At the sessions at the O. B. before Mich. T. 1701, the case was, that a woman trusted a porter to carry a bundle for her to Wapping, and went with the porter; and in going to the place, the porter ran away with the bundle, which was lost: and being tried for felony upon this fact, Holt C. J. directed the jury, that if they thought that the porter opened the bundle and took out the goods, it was felony, and they ought to find him guilty: and he thought that the fact, as above stated, was evidence of it. With submission to so high an authority, it may fairly be doubted whether there were sufficient evidence before the jury upon this statement to warrant them in finding that the porter opened the bundle and took out the goods; although we may suspect with great probability that such was the case. A different ground for the determination is suggested in another MS.; namely, that all the circumstances of the case shewed that the porter took the bundle at the first with an intent to steal it. In Wynne's case there was express evidence of the box having been opened by him (*a*). And so there was in Daniel Jones's case, who was the prosecutor's porter, and had the goods delivered to him to carry to a

MS. Tracy, & Denton, 62.

2 MS. Sum 233.

Ante, 664.

Jones's case, O. B. Dec. 1788, Sess. Pap. 1 Leach, 463. n.

(*a*) There too, the prisoner, a few days afterwards denied having ever seen the prosecutrix or the things, or having driven the coach at the time.

Ch. XVI. § 115. *By tortious conversion pending bailment.*

wharf to be shipped: And in another similar case of John Sears, at the O. B. 1789. And the like occurred in the case of William Bass, though the judgment did not turn on that fact. Another ground for the first-mentioned case of the porter was suggested by some of the Judges in the argument of Pear's case, as a matter worthy of consideration, namely, that the bundle, though delivered, being intended to continue in the owner's presence, was in point of law in her possession; upon which I have before ventured to offer a few observations which I see no reason to retract.

Ante, 566.

The separation of part of the goods delivered from the rest with a felonious intent seems however to be material where they are delivered as one entire body or mass, though no case or package be broken; because such an act equally evinces a determination of the privity of contract. Thus if a miller steal part of the meal, though the corn were delivered to him to grind; yet this being taken out from the rest is felony.

MS. Tracy, 60. cites 1 Roll. Abr. 73. pl. 16.

§ 116. *Conclusion.*

Upon the whole of this head of delivery by the owner, it appears that several questions may arise for the consideration of the court and jury.

1. Whether the delivery in fact to the prisoner transferred the legal possession to him, or whether it remained in the owner?

2. If the legal possession were intended to be transferred, but not the absolute property, whether such delivery were obtained fraudulently, and with intent to steal the property? Or,

3. If obtained without such intent, whether the privity of contract were at an end at the time of the conversion, so as to amount to a new taking and trespass?

The consequences in each of these several alternatives have been already stated.

8. *Upon a Taking through Necessity.*

§ 117. *On necessity.*

The last excuse or more properly palliation which is sometimes urged upon prosecutions of this nature is that the thing taken was for necessary food or cloathing for the body, in order

1 Hale, 54. 565. 1 Hawk. ch. 33. s. 20.

der to preserve life. This can never be admitted as a legal defence in a country like this, where such humane laws prevail for the care and maintenance of the poor. Even if the case existed in fact, it would in truth be but little excuse that the party preferred this method of satisfying his necessity, rather than apply to the persons charged with carrying those laws into execution, because perhaps of some trouble or apprehension of reproof. Yet still in apportioning the punishment, the Court will have a tender regard to cases of real necessity, which may and do sometimes exist under the best regulated governments. A false sense of shame has sometimes tempted persons, otherwise well disposed, to the commission of these offences. Sometimes, it is to be feared, they have been driven to it by the cruel and unfeeling conduct of others, who are in such instances more just objects of severity than the unhappy sufferers.

Ch. XVI. § 117 *On a taking by necessity.*

Of Larceny or Robbery from the Person.

§ 118. *Introduction.*

Having in the preceding part of this chapter treated so largely of the component parts of the crime of larceny, it will only be necessary to shew by what additional circumstances that crime is aggravated when the property is taken from the person. For what has been before said of the necessity of a taking and carrying away, of what goods, from what person, by whom, and with what intent, will equally apply to the present subject; any occasional particularities applicable to those heads of inquiry having been respectively noticed at the time in the general view of them. The general crime then of larceny from the person may be aggravated in two different manners. 1st, Where the thing is taken from the person *privately without his knowledge.* 2d, Where the person from whom it is taken is *put in fear* at the time, or the taking is accompanied with circumstances of *violence*, *threat*, *or terror*, which are sufficient grounds for presuming fear; in which case it assumes the denomination of robbery. I shall at present confine myself to the first of these offences.

Ch. XVI. § 119.

II. *Of Larceny Clam et Secretè from the Person.*

Clam et secretè by stat. 8 Eliz. c. 4.

§ 119. 8 Eliz. c. 4. *Clam et secretè.*

This offence is derived from the stat. 8 Eliz. c. 4. which reciting that, "whereas certain evil disposed persons, commonly called cut purses or pick purses, but indeed by the "laws of this land very felons and thieves, do confeder together, making among themselves as it were a brotherhood or fraternity of an art or mystery to live idly by the "secret spoil of the good subjects of this realm; and as "well at sermons and preachings of the word of God, and "in places and times of doing service and common prayer, "in churches, chapels, closets and oratories, and not only "there, but also in the Prince's palace and presence, and "at the places and courts of justice, and at the times of "ministering of the laws in the same, and in fairs, markets, and other assemblies of the people, and at the time "of doing execution, &c. do, without regard to any place, "time, or person, &c. under the cloak of honesty by their "outward apparent countenance and behaviour, subtilly, "privily, craftily, and feloniously, take the goods of divers "subjects from their persons by cutting and picking their "purses, and other felonious slights and devices," &c. enacts (s. 2.), "That no person or persons indicted or appealed for felonious taking of any money, goods, or chattels from the person of any other *privily without his knowledge*, in any place whatsoever; and thereupon found guilty by verdict, or shall confess the same upon his or their "arraignment, or will not answer directly to the same, or "shall stand wilfully, &c. mute, or challenge peremptorily "above 20, or shall be upon such indictment or appeal outlawed, shall be admitted to the benefit of clergy, and shall "suffer death," &c.

§ 120. *Offenders within the act.* 1 Hale, 529. 537. 2 Hale, 366. 2 MS. Sum. 271, 524. Steward's case, O. B. 1690, MS. Burnet. Fost. 356. 418. S. C. 1 Leach, 9.

1. The statute is confined to him who actually commits the fact, and extends not to accessaries before or after, nor even to those who are present aiding and abetting. And therefore where several were indicted for the fact, Raymond C. J., Denton J., and Comyns B. directed him only who took the goods to be found guilty of the privately stealing, and the others of the single felony; which latter accordingly

Rex v. Baynes and others, O. B. April 1731, Serjt. Forster's MS. (*vide* tamen somewhat different). MS. Tracy, 234

had

had their clergy. This was so ruled by the advice of all the Judges: and such is the constant practice at the O. B. and on the circuits. Wherefore if there be an accomplice present, and it cannot be told which of them took the goods, neither can be convicted of the capital part of the charge. But in Henry Sterne's case, for taking the Duke of Beaufort's George privily from his person, the Recorder, who in the presence of three Judges laid down the same rule, yet left it to the jury to consider, Whether the possession of the George by the prisoner, recently after the loss, were not evidence that he was the person who took it: but the jury only found him guilty of the simple larceny. In a prior case however Eyre B. laid no stress on this circumstance, but directed an acquittal of the prisoners as to the capital part of the charge, both being present at the fact, which happened while the prosecutor was asleep for about 10 minutes; though immediately after he awoke, the watch which had been taken from his fob during that interval was found on one of the prisoners.

Ch. XVI. § 120. *Clam et secretè by stat.* 8 Eliz. c. 4.

Sterne's case, O. B. Sept. 1787, Sess. Pap. No. 717. 2 Leach, 531.

Mary & Bridget Murphey's case, O. B. Ap. 1783, cor. Eyre B. 1 Leach, 302.

2. There must be an actual taking from the person; taking in his presence is not sufficient, as it is in robbery.

Taking from the person. 2 Hale, 366.

3. The stealing of notes, &c. is within the statute.

Ante, p. 598. & 646.

4. The goods stolen must be above the value of 12*d.*; otherwise clergy is not ousted, as in robbery: for the statute was not intended to alter the nature of the crime, but only to exclude clergy, where it was before necessary to pray the benefit of it.

Value. 1 Hale, 529. 2 Hale, 366.

§ 121.

5. The next and principal consideration is what shall be understood by the terms "*privily without his knowledge;*" and this affords two objects of inquiry.

Taking privily.

1. *What sort of a taking is meant as contradistinguished from a taking by force?*
2. *What sort of persons, in respect of the manner in which they are circumstanced at the time, are within the protection of the statute?*

1. Any sort of secret or sudden taking from the person, without putting him in fear, and without terror or open violence, seems within the act; though some small force be used by the thief to possess himself of the property; provided there

What a taking privily as to the manner.

Ch. XVI. § 121. *Clam et secretè by stat.* 8 Eliz. c. 4.

there be no resistance by the owner, or injury to his person; and the circumstances of the case shew that the thing was taken, not so much against as without his consent.

Steward's case O. B. 30 April 1690, 2 MS. Sum. 267. cites Chapple's notes. 1 Hawk. ch. 35. s. 1.

In Steward's case it was ruled by Holt C. J. that snatching a hat and wig from the head of a person walking in the street was no robbery, because the party was not put in fear; but that it was *clam et secretè* within the statute 8 Eliz. Yet the snatching of a hat from a man's head is put by Hawkins as an instance of an open larceny in contradistinction to *clam et secretè*. But Yates J. thought that perhaps the doing it in a street or crowd, where the thief might not easily be distinguished, might make the difference. So in Danby's case it was holden by Trevor and Eyre, that snatching a bundle from a woman in the street, and running away with it, was a taking *clam et secretè* from the person. In that case the record of Steward's case above mentioned was produced. And in Corbett's case, O. B. 8th July 1713, there was the like determination by Price and Eyre J. In all these cases a degree of force must have been used; but the circumstances shewed that the property was taken rather without than against the consent of the several owners; rather by means of the surprise and slight of hand than by open violence or terror. But it does not appear whether any of those persons whose property was so taken were themselves eye witnesses of the fact, so as to perceive the object of the thief at the moment of the act; though certainly there must have been a consciousness of it. I mention this, because in Brown's case, where the prisoner took the prosecutor's watch out of his pocket while sleeping, but who was thereby awakened just at the instant, and caught at his watch, but missed it. Hotham B., with the advice of Aston J., left it to the jury whether, under the circumstances of the case, they would acquit the prisoner of *privately* stealing, &c. and find him guilty of the simple larceny; as it could not be well said to be *privately* stealing, when the prosecutor had seen part of the fact. In Baker's case, O. B. 1783, and in Macauley's case at the same session, the prisoners, who had snatched property in the one instance from the head of the owner, and in the other from his hands, as they were respectively walking in the street, but without speaking to them or touching or stopping them,

2 MS. Sum. 267.

Danby's case, O. B. 9 Dec. 1713, 2 MS. Sum. 267.

Corbett's case, ib.

Brown's case, O. B. about 1777, Serjt. Forster's MS.

Baker's case, 1 Leach, 324.

them, were respectively indicted for robbery, and acquitted, by the direction of the Court, of the capital part of the charge; without any intimation that their offences were indictable under this statute. And in Plunket Horner's case, upon a similar charge, where the property, an umbrella, was snatched suddenly out of the prosecutrix's hand, as she was walking along the street, the Court said that it had been ruled there about 80 years before by very high authority, that the snatching any thing from a person unawares constituted a robbery; but the law was now settled, that unless there were some struggle to keep it, and it were forced from the hand of the owner, it was not so. And they said that this species of larceny seemed to form a middle case between stealing privately from the person and a taking by force and violence. The same distinction had been taken before in Chick's case, O. B. December 1781. Certain it is, that all open larcenies from the person, as contradistinguished from a stealing privily without the party's knowledge, are within the benefit of clergy, except robberies and such larcenies as are committed in dwelling-houses under particular circumstances, which have been before spoken of.

Ch. XVI. § 121.
Clam et secretè by stat. 8 Eliz. c. 4.
Horner's case, O. B. Jan. 1790, cor. Buller J. and Thomson B. ibid.
Chick's case, ibid. 2 MS. Sum. 271.
Ante, 623, &c.

But in no case where the property is obtained by any struggling or violence to the person does the offence fall within this statute; as is shewn more particularly hereafter; when it may also be more properly considered what is a sufficient force to constitute a robbery.

Post. 708, &c.

§ 122.
Upon whom the offence may be committed.

2. The next point of consideration, which is intimately blended with the preceding, is, Whether it be necessary that the person upon whom this offence is committed should be capable of knowledge at the time of the fact? It was formerly holden that persons asleep or drunk were not within the protection of the act, which speaks of places of public resort and the like, where persons were supposed to use ordinary caution, and not expose themselves by carelessness or misbehaviour to these accidents. Upon this idea the case of a man was ruled at the O. B. by Aston and Gould, Justices; in which it appeared that the prosecutor returning home from Vauxhall one night, and being either fatigued or in liquor fell asleep on one of the benches on Westminster bridge,

Ex relatione. Aston J. MS. Buller J. and Serjt. Forster's MS.
The statute extends not to one drunk and asleep in the streets.

Ch. XVI. § 122. *Clam et secretè by stat.* 8 Eliz. c. 4.

bridge, in which situation the prisoner stole his silver buckles. This was then ruled not to be a private taking within the act; for it was said that the statute meant only to protect persons going about their lawful business in particular situations mentioned therein, and not such idle loitering persons as were lying about in the streets. And the same point was afterwards ruled by Hotham B. upon the authority of the former case, and of another which he mentioned in the instance of a hackney coachman, whose pocket was picked while he was asleep in his coach. Yet subsequent cases more solemnly considered have put a more enlarged construction upon the statute in this respect; to protect all persons at least who have not exposed themselves to such a loss by their own negligence or misbehaviour.

R. v. Reading and Jones, O.B. Dec. 1778, ibid. (S. C. 1 Leach, 276. n.)

Branny's case, Carlisle, Sum. Ass. 1786, cor. Buller J. Buller J. *Picking another's pocket in the highway, who was awake but insensibly drunk, held within the statute; the person having been made drunk by the artifice of the prisoner for that purpose.*

William Branny was indicted for privately stealing from the person of Hugh M'Guinar 43 guineas and 13 half-guineas. The prosecutor was an illiterate Irish drover, who sold cattle at Ravinglass fair; where the prisoner, a total stranger to him, got acquainted with him under pretence of being his countryman; and having wormed out of him that he had received his money for his cattle, the prisoner and two of his companions followed him to Calder bridge. There the prisoner insisted on lying with the prosecutor, which he did; but the latter having put his money in his fob, and fastened a pin across it, preserved it for that time. The next morning the prisoner and his companions got up before the prosecutor, and had breakfast ready when he came down stairs. They all breakfasted together; and then the prisoner and his companions proposed to have some brandy; and accordingly they had a great quantity, out of which it was contrived that the prosecutor should drink half; with which he was so intoxicated that the landlord and his wife proposed putting him to bed, but the prisoner and his companions said they would take him away with them; and accordingly they put him on a horse and carried him about 300 yards from the house, where the prisoner picked his pocket of his money without his knowledge, and left him in the road. The jury found the prisoner guilty; and also found that at the time when he took the money the prosecutor was awake, but insensibly drunk. The case was reserved

reserved for the Judges to consider, Whether, under the circumstances, the prisoner were guilty of a capital offence within the act? On the first day of Mich. T. 1786, nine Judges being present, they all held the conviction proper. Five of them held that the statute extended to all cases where goods were stolen from the person of another without his knowledge, whether he were awake or asleep, drunk or sober, &c. The other four then thought that it did not extend to the case of a man who was asleep, but only to cases where some craft or cunning was used by the prisoner: But on account of the craft and artifice used by the prisoner in this instance, they all agreed that his conviction was proper. Gould J. said that the prisoner's whole conduct was *in fraudem legis.*

Ch. XVI. § 122. *Clam et secretè by stat.* 8 Eliz. c. 4.

(Lord Loughborough, Ashhurst, Hotham, Buller, and Heath, Js.)

Post. 706.

At the same meeting the case of John Thompson was also taken into consideration. He was indicted for privately stealing from the person of Jonathan Simpson, without his knowledge, a silver watch. The property was proved to have been taken by the prisoner from the person of the prosecutor, a master of a ship then lying in the river Tyne, whilst he was asleep in his cabin, privately and without his knowledge. He was convicted, and Heath J. passed sentence of death on him. But the counsel for the prosecution very candidly producing a case decided at Durham some years before, wherein it was ruled that the statute did not extend to persons asleep, the case was reserved for the opinion of the Judges. Upon the consultation at this time the cases which I have before mentioned were quoted and considered: but the five Judges above named held the conviction to be proper against the other four upon the grounds mentioned in the last case: so the case was adjourned to Hil. T. 1787, and again to Easter term succeeding, when all the Judges agreed that the conviction was proper. And this is now the received construction. For in Willan's case, who picked the pocket of a waggoner sleeping in the stables of an inn-yard while his horses were feeding, the same objection being taken as to the construction of the act, the Court said that whatever notions might formerly have prevailed on the subject, it was now decided by all the Judges in Thompson's case to be within the act; and

Thompson's case, Newcastle Sum. Ass. 1786, cor. Heath J. MS. Buller J. and MS. Jud. (S. C. 2 Leach, 498.) *A master of a vessel asleep in his cabin is within the protection of the act.*

Willan's case, O. B. June 1788, cor. Adair Serjt. Recorder. 2 Leach, 558. *So a waggoner asleep in the stables of the inn-yard.*

Ch. XVI. § 122. *Clam et secretè by stat.* 8 Eliz. c. 4.

that this had been since confirmed by another like case at Bristol.

But where it appeared that the prosecutor being drunk was picked up by the prisoner, a woman of the town, in the street, and went with her to a house, where he fell asleep; during which time, without his perceiving it, she picked his pockets of two guineas and upwards; the Judges, on reference to them after conviction, held that the case did not fall within the stat. 8 Eliz. being only simple larceny: and that this was distinguishable from Branny's case; there having been no fraud used by the prisoner in making the prosecutor drunk, but he having fallen into that state by his own default: and that it was all to be taken as one transaction.

Margaret Kennedy's case, cor. Lawrence J. O. B. Jan. 1797, before all the Judges, (except Buller J. absent) in Hil. Term 1797, MS. Jud. *Aliter where prosecutor was drunk by his own default.*

The case of Gribble, which was there referred to, was of the same sort. The prosecutor and the prisoner having drank together in a public house till both were much intoxicated, afterwards went together to the prisoner's lodgings, where the prosecutor falling asleep, the prisoner took that opportunity of stealing his watch: and it was ruled by the Court that the case was not within the statute, but only simple larceny.

Gribble's case, O. B. Feb. 1782. 1 Leach, 275.

§ 123. *Indictment and verdict.* 1 Hale, 529. 2 Hale, 366. 2 MS. Sum. 266. 271. 3 Bulstr. 71. 1 Hawk. ch. 36. s. 4. 2 Hale, 190. Crown Circ. Comp. 304.

The indictment must lay the offence to have been done *privily without the knowledge* of the party, in exact pursuance of the words of the statute; otherwise the prisoner will be entitled to his clergy. And so he is if the value be not laid as well as proved to be above 12*d.* But the indictment need not conclude *contrà formam statuti:* for this was a felony before; and the statute does not inflict a new punishment or alter the nature of the crime, but only takes away clergy under the circumstances. And in this, as in other aggravated larcenies, the prisoner may be acquitted of the capital part of the charge, and found guilty of simple larceny.

III. *Of Robbery, (properly so called.)*

Ch. XVI. § 124. *From the person by violence or terror.*

The next species of aggravated larceny from the person is robbery; which is a felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear. Upon which several points occur for consideration, some of which have been already disposed of. What is a sufficient taking, of what goods, by what person, from whom, and with what intent, have been treated of largely before. It remains to see,

§ 124. 2 MS. Sum. 258. 1 Hale, 532, 4. 4 Blac. Com. 242. Fost. 123. Ante, 553, &c.

1. *How far the value is material.*
2. *What shall be said to be a taking from the person.*
3. *What degree of violence or putting in fear is necessary.*

What is necessary to be shewn touching clergy; the manner of laying the offence in the indictment; and what verdict may be given thereon, will be hereafter stated.

1. *As to the Value.*

§ 125. *Value.* 3 Inst. 69. Sum. 73. 1 Hawk. ch. 34. s. 3. 9. Staundf. 27. 1 Hale, 531. *Vide* post. s. 138. as to clergy. Ante, 415.

It is sufficient to oust clergy if the thing taken be of any value, though under 12*d.*; for the gist of the offence is the force and terror. But some thing must be taken; for an assault with intent to rob is an offence of a different and inferior nature, which has been already mentioned.

2. *What is a taking from the Person.*

§ 126. *What is a taking from the person.* 3 Inst. 68, 9. 1 Hale, 533. Staundf. 27. Pult. de pace, 131. b. 1 Hawk. ch. 34. s. 5. 4 Blac. Com. 242. Ante, 3, 4. 8. 1 Sid. 263. *Sed vide* Goulds. 86. *Vide* post. Merriman's case.

In robbery, it is sufficient if the property be taken in the presence of the owner; it need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat which had fallen from his head. Where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the day time, but

Ch. XVI. § 126. *What is a taking from the person.*

but did not rob the goods till night, some have holden it to be a robbery from the first force; but others consider that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves. But where thieves struck money out of the owner's hands, and by menace drove him off so that he could not take it up, and then they took it up themselves; it not being found in the special verdict that they took up the money in the sight or presence of the owner, the court would not intend it. And as the first striking the money out of his hand was without putting him in fear, the prisoners were consequently entitled to their clergy (*a*). And the same was resolved by K. B. in the case of The King v. Grey and others, with the concurrence of all the Judges.

R. v. Francis and others, 2 Stra. 1015. Com. Rep. 478. S. C.

R. v. Grey and others, E. 8 G. 2. MS. Burnet, 73.

3. *What Violence or Fear is necessary.*

§ 127. *Violence or Fear sufficient.*

It was before stated, as part of the definition of this offence, that the property must be taken from the person by violence or by putting him in fear: and certainly it is not only true that either of these circumstances is sufficient to constitute the offence, but if either be laid in the indictment, it is enough; provided it appear that the property was taken without or against the will of the party by one or other of the means aftermentioned; some of which have already been alluded to in considering what should be deemed a taking. As to the sort of violence necessary to be proved, where the property is obtained in that manner, it has been already in part considered under the last division of this subject. It was there shewn that no sudden taking of a thing unawares from the person, as by snatching any thing from the hand or head, is sufficient to constitute a robbery, unless some injury be done to the person, or unless there be some previous struggle for the possession of the property.

Per Holt C. J. at a conference of all the Judges after Trin. T. 3 Ann. MS. Tracy, 71. Dyer, 224. b. pl. 30. Post. s. 167. 4 Blac. Com. 242, 3. Ante, p. 555. Ante, s. 121.

Lapier's case, ante, s. 4.

In Lapier's case before mentioned, although Mrs. Hobart's ear-ring was pulled so suddenly from her ear that she

(*a*) As the only doubt raised by the special verdict was, Whether the prisoners were or were not guilty of robbery, the Court thought that judgment could not be given against them on that record as for grand larceny, of which it appeared that they were guilty: therefore they were remanded to be tried for that offence on another indictment.

had

had no time or opportunity for resisting, yet being done with such violence as to injure her person, the blood being drawn from her ear, which was otherwise much hurt, the prisoner was holden guilty of robbery. Ch. XVI. § 127. *By violence.*

Davies alias Beard was indicted for taking a gentleman's sword from his side *clam et secretè:* but it appearing that the gentleman perceived that Davies laid hold of his sword, and that he himself laid hold of it at the same time and struggled for it; this was adjudged robbery. Davies's case, O. B. 11 Ann. 2 MS. Sum. 267. cites Denton's MS. MS. Tracy, 75.

In regard to taking by force under any lawful or indifferent pretence; that has been partly noticed under the first head of inquiry; but whatever the pretence may be, if the true intent be to steal under the definition before given, and the possession be obtained by force and violence from the person of the owner or in his presence, it amounts to robbery. Ante, s. 3.

Merriman, carrying his cheeses along the highway in a cart, was stopped by one Hall, who insisted on seizing them for want of a permit; (which was found by the jury to be a mere pretence for the purpose of defrauding Merriman, no permit being necessary); and on some altercation, they agreed to go before a magistrate to determine the matter. In the mean time other persons riotously assembled on account of the dearness of provisions, and in confederacy with Hall for the purpose, carried away the goods in Merriman's absence. It was objected to be no robbery; there being no force used; but only larceny; but Hewitt J. over-ruled the objection, and left it to the jury, who found it robbery, and found a verdict for the Plaintiff Merriman in an action against the Hundred of Chippenham, on the statutes of hue and cry: and upon motion for a new trial in M. 8 Geo. 3. the Court of K. B. were clearly of the same opinion (*a*). Merriman v. The Hundred of Chippenham, M. 8 G. 3. B. R. MS. Buller J.

Samuel Gascoigne was indicted for a highway robbery on Jane Edwards. It appeared in evidence that the prosecutrix was brought before a magistrate on a complaint for an assault upon another woman. The magistrate [as the prisoner alleged, though it was not produced,] made out a warrant of commitment for the prosecutrix, at the same time advising Gascoigne's case, O.B. 1783, MS. Buller J. (S. C. 1 Leach, 313.) *A runner at the police-office taking money out of the hand and pocket of a prisoner, whom he had before handcuffed and was conducting to pri-*

(*a*) This opinion must have been grounded on the consideration, that the first seizure of the cart and goods by Hall being by violence, and whilst the owner was present, constituted the offence a robbery. *Vide* ante, s. 126.

Ch. XVI. § 127. *By violence.*

son, under pretence of letting her go home, and paying for coach-hire and liquor which he had himself ordered, is guilty of robbery; the jury finding that all this was done with a felonious design to get her money; although the party in custody had before offered him the money if he would let her go home, and repeated the offer after he had taken it in that manner.

the parties to make it up. The prosecutrix sent for her husband, and on his arrival, the affair not being ended, he went away to get bail, of which she informed the magistrate; but the latter leaving the office, the prisoner told her that he would take her to gaol. She intreated him to stay till her husband returned, but he refused to wait even a quarter of an hour. He then asked her if she would have a coach, which she declined; but a coach was sent for. She then besought him not to send her away from her family till her husband returned, and she offered him a shilling which she had in her hand if he would permit her to stay till her husband's return; but he refused, and kicked her into a coach, and handcuffed her to a man who was then going to prison, and who had before rescued himself, as the prisoner alleged. The prisoner also came into the coach, and put his handkerchief to her mouth, and took the shilling out of her hand, and said, "this will buy us a glass a-piece." He then asked her for more money, and said he would bring her back; and immediately put his hand in her pocket, and took all the money he could find, which was 3*s.*, and said he would carry her back. He then stopped the coach at an ale-house, and bid the coachman call for gin, which he drank, and gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused; but he insisted she should drink it. He gave the shilling he first took from her to pay for it, and took 6*d.* in change. She made no complaint then, as he had promised to carry her back, but said if he would do so, he should be welcome to the other 3*s.*; instead of that she was carried to prison. No part of the money was ever returned to the prosecutrix; but the coachman said that the prisoner paid for the coach either 1*s.* or 1*s.* 6*d.* The prisoner was not a constable or officer, but at that time attended the public office; nor did it appear that he in particular had any order to carry the prosecutrix to prison. Nares J. left the case to the jury, with this direction, that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he did take the money with a felonious intent, they should find him guilty; otherwise they should acquit him.

The

The jury found him guilty, and added, that he had a felonious intent of getting what money the woman had; and that the putting of her in the state proved was only a colourable mean of carrying his felonious intent into execution. In Mich. T. 1783, all the Judges were of opinion that this was robbery. Ch. XVI. § 127. *By violence.* See the judgment delivered by Ashhurst J. O. B. Jan. 1784, Sess. Pap. p. 295.

§ 128. *Fear.*

Robbery may also be constituted by putting in fear as well as by force; or perhaps in strictness it may be said that fear will supply the place of force. Yet it is not necessary that actual fear should either be laid in the indictment, or strictly and precisely proved; provided the property be taken with such circumstances of violence or terror, or threatening by word or gesture, as would in common experience induce a man to part with it from an apprehension of personal danger; for the law, *in odium spoliatoris*, will presume fear where there appears to be so reasonable a ground for it. But it is necessary that it be taken against the will of the party. If a man be knocked down without previous warning, and stripped of his property while senseless, he can with no propriety be said to be put in fear; and yet that would undoubtedly be robbery. So a colourable gift, which in truth was extorted by fear, amounts to a taking and trespass in law. As if a person with a drawn sword, or other circumstances of terror indicating a felonious intent, beg alms of another, who gives it him through mistrust and apprehension of violence, the offence is the same notwithstanding the pretence. So it is whether there were any weapon drawn or not: or whether it were an offensive weapon: or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him upon his ceasing to use force, and asking it for alms; for the owner was put in fear by the assault, and there remained a reasonable ground for its continuance. Fost. 128, 9. 1 Hale, 533, 4. per Holt C. J. at a meeting of the Judges after Trin. Term, 7 Ann. MS. Tracy and Denton, 71. 2 MS. Sum. 264. 4 Blac. Com. 243. Ante, p. 555. 1 Hawk. ch. 34. s. 6. Fost. 128.

The same rule holds, although the thing taken were not really within the original contemplation of the robber, nor the object of his pursuit at the time.

Blackham assaulted a woman with intent to commit a rape, and she without any demand from him offered him money, which the prisoner took and put into his pocket, but Rex v. Blackham, Trin. Term 1787, 2 MS. Sum 262. MS. Gould J. and MS. Jud.

Ch. XVI. § 128. *By fear.*

but continued to treat her with violence to effect his original purpose, till he was interrupted by the approach of another person. This was holden to be robbery by a considerable majority of the Judges: for the woman, from violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and the prisoner, by taking it, derived that advantage to himself from his felonious conduct; though his original intent were to commit a rape.

Taking money to desist from a rape.

Taplin's case, O. B. June 1780, cor. Nares J. MS. Buller J. *Vide* Brown's case, post.

During the riots in London in the year 1780, a boy with a cockade in his hat knocked violently at the door of the prosecutor Mahon, who thereupon opened it; and the boy said to him, "God bless your honour, remember the poor mob." Mahon told him to go along; on which he said, "Then I will go and fetch my captain." He went; and the mob, to the amount of 100, armed with sticks and what else they could get, soon after came, headed by the prisoner Thomas Taplin on horseback, having his horse led by the same boy. On their coming up, the bystanders said, "You must give them money;" and the boy said, "Now I have brought my captain." Some of the mob said, "God bless this gentleman, he is always generous." Mahon then asked the prisoner, "How much?" who answered, "Half-a-crown, Sir." On which Mahon, who had before only intended to give a shilling, gave the prisoner the half-crown. On this the mob gave three cheers, and went to the next house. This was holden robbery.

Rex v. Simons, Cornwall Lent Ass. 1773, 2 MS. Sum. 262. MS. Gould J. and MS. Jud. Ante, s. 98.

If a person by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer, less than the value; this is also robbery. As where the prisoner took a bushel and a half of wheat worth 8*s.* and forced the owner to take 13½*d.* for it, threatening to kill her if she refused; this was clearly holden to be a robbery by all the Judges upon a conference.

Spencer's case, York Sum. Ass. 1783, cor. Buller J. MS. Buller J.

Again in the case of one Spencer, the prosecutor Anderton swore, that having in his possession corn belonging to other persons, the prisoner came to him, together with a great mob marching in military order; and one of the mob said, that if he would not sell, they were going to take it away;

away; and the prisoner said that they would give 30*s.* a-load, and if he would not take that, they would take the corn away; on which the prosecutor sold that for 30*s.* which was worth 38*s.*: this was ruled to be robbery, and the prisoner was convicted and executed. Ch. XVI. § 128. *By fear.*

§ 129.

It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is no where defined in any of the acknowledged treatises upon this subject. Lord Hale proposes to consider what shall be said a putting in fear, but he leaves this part of the question untouched. Lord Coke and Hawkins do the same. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of the party*, and he lays the circumstance of fear out of the question; or that at any rate when the fact is attended with circumstances of violence or terror, the law *in odium spoliatoris* will presume fear if it be necessary, where there appears to be so just a ground for it. Mr. Justice Blackstone leans to the same opinion. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staundford defines robbery to be a felonious taking of any thing from the person or in the presence of another *openly, and against his will;* and Bracton also rests it upon the latter circumstance. I have the authority of the Judges as mentioned by Willes J. in delivering their opinion in Donally's case, at the O. B. 1779, to justify me in not attempting to draw the exact line in this case; but thus much I may venture to state, that on the one hand the fear is not confined to an apprehension of bodily injury; and on the other hand it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him as it were under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence, or assault upon the person.

Fear of what nature. 1 Hale, 534. 3 Inst. 68. 2 Hawk. ch. 34. Fost. 123. 128. *Vide* post. a. 132. 4 Blac. Com. 242. Staundf. lib. 1. c. 20. Brac. lib. 3. fo. 150. b. Donally's post. 715.

Before I state the cases which have occurred in modern times on this subject, I shall mention a case of robbery on this head, instanced by nearly all the writers on the subject,

Ch. XVI. § 129. *Fear, of what nature.*

which by some does not appear to have been clearly understood.

Staundf. 27. 1 Hale, 532. 3 Inst. 68. 1 Hawk. ch. 34. s. 1.

Thieves come to rob *A.*, and finding little about him, enforce him by menace of death to swear to bring them a greater sum, which he does accordingly (*a*); this is robbery; not for the reason assigned by Hawkins, because the money was delivered while the party thought himself bound in conscience to give it by virtue of the oath which in his fear he was compelled to take; which manner of stating the case affords an inference that the fear had ceased at the time of the delivery, and that the owner then acted solely under the mistaken compulsion of his oath. But the true reason is given by Lord Hale and others; *because the fear of that menace still continued upon him at the time he delivered the money;* and therefore the indictment need not be more special than in ordinary cases.

§ 130. *On accusation of an unnatural crime.* R. v. Jones, alias Evans, O. B. Feb. 1776, cor. Hotham B. MS. Gould J. Serjt. Forster's MS. (S. C. Leach, 164.) *Extorting money by threatening to charge the party with an unnatural crime, is robbery.*

The prisoner was indicted in the usual form for a highway robbery. The facts proved were, that the prisoner, an entire stranger to the prosecutor, followed him out of the theatre, where they had accidentally met, into the street, and asked him whether he did not choose to drink; the prosecutor replying that it was his intention so to do, the prisoner followed him into a public house, where they drank some porter: after which the prisoner asked him what he meant by those liberties that he had taken with his person at the play-house; and on the prosecutor's expressing his surprise at what he meant, the other continued in the same sort of strain, which frightened the prosecutor very much; and he went out intending to get away from him: but the prisoner followed and seized him by the arm, threatening to raise the mob if he attempted to run; and telling him that he had offered him an indignity not to be borne, and for which nothing could make satisfaction. The prosecutor then being exceedingly terrified, asked him what he

(*a*) This case was alluded to by one of the judges at the conference on Reane's case after mentioned (s.132.), who observed that it was not exactly as stated by Lord Hale. That it seemed a more immediate act than appeared by that book; and was to be found in *Fitz. Abr. Coron.* 464. 4 *Hen.* 4. *Staundf.* 27. *a. E.* 42 *Ed.* 3. 14. *b.*

would

would have him do. The prisoner replied that he must make him a present; which he explained by saying that he must give him what money he had about him: on which the prosecutor gave him 3 guineas and 12*s.* being all he had. The other took it, and insisted on more, all the time holding the prosecutor fast by the arm; and at last followed him home, and called again the next morning, and got some more money. It was left to the jury to consider, Whether the prosecutor were put in fear, and under that impression had parted with his money. And the jury declared that they thought such an accusation would strike a man with as much or more terror than if he had a pistol at his head; and they found the prisoner guilty: but judgment was respited to take the opinion of the Judges, whether these circumstances would support a conviction for a highway robbery. In Easter T. 1776, nine Judges present agreed that the conviction was proper: for to constitute robbery there was no occasion to use weapons or real violence; but that taking money from a man in such a situation as rendered him not a free man; as if a person so robbed were in fear of a conspiracy against his life or character, was such a putting in fear as would make the taking of his money under that terror a robbery; and they approved of Brown's case in point, which was tried before Eyre B. when Recorder.

Ch. XVI. § 130. *Fear, of what nature.*

(Absent De Grey C. J. and Ashhurst J. and one vacancy.)

Brown's case, O. B. Oct. 1763.

Robert Harrold was afterwards convicted for a similar robbery, with the approbation of the Judges.

Harrold's case, alias Hutton, O. B. June 1778.

This matter was again most deliberately considered in Donolly's case, who was tried at the O. B. 1779, for a highway robbery. It appeared that as the prosecutor was passing through Soho-Square one evening, he was accosted by the prisoner (a stranger to him), with a desire that he would give him a present. The prosecutor asked for what? the prisoner answered, "You had better comply, or I will take "you before a magistrate, and accuse you of an attempt to "commit an unnatural crime." The prosecutor then gave him half a guinea, which the prisoner said was not sufficient; but the other had no more in his pocket. Two days afterwards, in the evening, the prosecutor again met the prisoner in Oxford-Road, who made use of the same threats as before, telling the prosecutor that he knew what passed in Soho-

R. v. Jas. Donoly, O. B. Feb. 1779, cor. Buller J. MS. Buller J. and MS. Jud. (S. C. 1 Leach, 229.)

Obtaining money from another by force of a threat of carrying him before a magistrate and accusing him of an unnatural crime, is robbery.

Ch. XVI. § 130. *Fear, of what nature.*

Soho-Square, and unless he would give him more money, he would take him before a magistrate, and accuse him of the same attempt; adding, that it would go hard with him, unless he could prove an alibi. The prosecutor then went into an adjoining shop, whither the prisoner followed him, and staid at the outside of the door. The prosecutor took a guinea out of his pocket and gave it to the shopkeeper, desiring him to give it to the man at the door, which was done; and the prisoner then departed. The prosecutor then deposed that he was exceedingly alarmed on both occasions, and under that alarm gave the money. That he was not aware what were the consequences of such a charge, but apprehended it might cost him his life. The jury were desired to consider, 1st, Whether, upon the evidence, they were satisfied that the prosecutor delivered his money through fear and under an apprehension that his life was in danger? Or 2dly, If they did not think that the prosecutor apprehended his life was in danger, whether the money were not obtained by means of the prisoner's threats, and against the will of the prosecutor? For if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery. The jury found the prisoner guilty; and said they were satisfied that the prosecutor delivered his money through fear and under an apprehension that his life was in danger.

There being some difference of opinion among the Judges on this case, they directed it to be argued before them, which was done on 29th April 1779, at Lord C. J. De Grey's house, present all the Judges; when after very full consideration, they at length all agreed that the case amounted to robbery. In the course of their debate, many of the Judges touched on the question which I have before alluded to, as to the nature of the fear moving the party to part with his property in cases where no actual violence was employed to obtain it; which I think the more worthy of remark as I do not find any express authority upon the subject in point. I shall therefore shortly advert to the grounds of their opinion.

BULLER J. held first that the cases which had been decided on this subject, [and which have been before stated], concluded

concluded the present question. And secondly, that independent of those cases, this was robbery on general principles. For which he relied chiefly on Fost. 128 and 1 Hale, 533, 4. That to constitute a robbery, it was not necessary that there should be any weapon drawn, or an actual laying of hands on another, which in fact seldom happened. But if such threats were used as would impose terror on a reasonable man's mind, and would leave him not a free agent, but induce him to part with his money against his will, it was robbery, in whatever words the threat was conveyed. Whether a thief, who stopped a man, said, "Give me your money," "deliver your money," or "make me a present;" it was equally robbery; for the intention was the same, namely, to force the man so attacked to part with his money against his will. That if nothing more had been said in this case than "give me a present," he still thought it would have been a robbery; for that was a demand of money: and if that demand were so made as to impose a fear on the mind of the person attacked, and under that fear he parted with his money, it brought the case exactly within the definitions of robbery given by Lord Hale and Mr. Justice Foster. But the subsequent words used were a threat of immediate violence and personal injury; and the prisoner's saying, when the prosecutor had given him half-a-guinea, that it was not sufficient, was a plain proof that he meant to force from him all the money he had about him. He also held that a fair argument was to be drawn from the statute 7 G. 2. c. 21. which made it felony for any person by menaces or in a violent manner to demand money with intent to rob: and the stat. 30 G. 2. c. 24. which makes it a transportable offence to send a letter threatening to accuse, &c. with a view or intent to extort money. For it could not be supposed that the legislature would not at the same time have provided for cases where money actually was obtained, as where there was only an attempt to obtain it, unless they had been satisfied that if the money were obtained it was a robbery.

Ch. XVI. § 130. *Fear, of what nature.*

PERRYN B. was at first of opinion that this was not robbery. He distinguished it from Brown's case, where there was actual violence used in the assault, and laying hands on

Ante, 715.

Ch. XVI. § 130. *Fear, of what nature.*

Ante, 714.

on the party; and also from Jones's case, where there was a continual force and violence, a mob and crowd, to whose resentment and violence the prosecutor apprehended he should be delivered up. That the case depended on the definition of robbery, which Lord Hale and Hawkins agreed was a felonious and violent taking against the party's will; and he thought it necessary, in all cases of robbery, either that there should be actual force or a threat of it; as to deliver the party to the mob, or to carry him to a horse pond, or the like; which he thought would be sufficient. But that here the party had his option either to deliver his money or not, and it was rather a case of giving than taking. However, after hearing the opinions and reasons of the other Judges, he desired to retract his opinion, and concurred with them that this was robbery.

HOTHAM B. said, that as to the former cases determined on this subject, there was in each so much of force as, abstracted from other considerations, would constitute robbery. But the question was, Whether getting money from a person under such a threat as the present, without actual force, were robbery? That he was clearly satisfied that it was not necessary, in order to constitute a robbery, where the property was obtained by means of a threat, without actual force, that there should be a fear of death in the party robbed, or an immediate fear of danger to his person. In the cases put in argument, of one man walking with his child, who delivered his money to another, upon a threat that unless he did so that he would destroy the child (*a*); or of another man parting with his money, in order to save his house from being fired; he had no doubt but that in either case it was sufficient to constitute robbery. That if a man parted with his money under such circumstances as that he could not resist the demand without fear of injury to his person or property, the offence was complete. In this case there was a

(*a*) Bracton, lib. 2. cap. 5. (in treating s. 13. & 14. Quod donatio sit gratuita et non coacta; et quid sit metus;) says, fo. 16. b. "Et non solum "excusatur quis qui exceptionem habet, si sibi ipsi inferatur vis vel me- "tus; sed etiam si suis; ut si filio vel filiæ, fratri vel sorori, vel aliis do- "mesticis et propinquis; sicut de eodem Falcone, qui tenuit in prisonâ "fratrem cujusdam, donec frater ejusdem qui fuit extra prisonam dedit "ei quoddam manerium."

fear

fear of disgrace, if not of life, in being carried through the streets under a charge of this nature; the fear of which did not leave the party a free agent to resist or comply with the demand. That Mr. Justice Foster, in his definition of robbery, considered the doing of the act *violently* or *against the will of the party*, as synonymous terms: and whether the party were obliged to part with his money from fear of personal danger, or of loss of character, was the same thing; it being equally against his will in either case. Ch. XVI. § 130. *Fear, of what nature.*

Eyre B. expressed himself in great doubt at first, though he stated the leaning of his opinion to be that it was robbery. He said his difficulty lay in drawing the line between robbery, and extorting money by undue influence. As to the notion of putting in fear, it had been carried a great deal too far, as connected with the definition of this offence. It seemed to him to be rather a consequential than essential part of the offence. It had been decided that putting in fear need not be laid in the indictment. If there were a taking by force, though no fear, it was never doubted but that it amounted to robbery. That the first and general definition of the offence was a violent and felonious taking from the person. An old author [West, Symbol. 90.] says a violent taking from the person, because in law it imposes fear. The old precedents of indictments never stated the putting in fear: there were many such in West: others stated *in corporali timore;* but *in fear of life* was of very modern introduction. That in the case mentioned from Dyer, 224 b. pl. 30. it was holden no robbery, because there was no putting in fear: but there the indictment did not lay the offence to have been done *violenter*. Perhaps from that time this form of indictment grew into use. That as to the case where the owner delivered his money on demand, it must amount to a constructive taking, in order to make it robbery. If a pistol were presented to a man, though nothing were said, it was a constructive force. That there must be fear either in the case of a constructive or an actual taking; but it was a constructive fear. A menace of any kind which operated so far on a man as to put him in his own apprehension under a necessity of delivering his money to another, who

Ch. XVI. § 130. *Fear, of what nature.*

who meant to steal it, was a constructive force: and if the owner were laid under a moral necessity of delivering his money to another, it was a constructive taking. At the conclusion of the debate the learned Judge declared himself perfectly well satisfied that this amounted to robbery.

Nares J. said, he spoke with diffidence, though he had a formed opinion that this was robbery, according to the legal definition of it by Lord Hale and Hawkins taken together. That an actual assault was not necessary; putting in fear was equal to it. By Staundf. 27. a. if one menace another to deliver his money immediately or he will kill him, it is robbery as much as if he took it from his person. Dalton indeed says, that the taking must be by force or violence; but he had mistaken Dyer, 224. b. That here it was found by the jury that the prosecutor delivered his money under an apprehension that he was in fear of his life. Should it be said in answer that he did not know the law; that made no difference. The question was, What effect the threat had on his mind? If he so apprehended it, it was sufficient. That it would be of the utmost ill consequence to say, that a man might have the ingenuity to get money from another as much against his will as if he had presented a pistol to his breast, and yet he should not be punished for it. That larceny was a felonious and fraudulent taking of the goods of another, &c. and this was a species of fraud practised by the prisoner; and the money having by means of it been obtained as much against the will of the party as if he had shot at him, the offence amounted to robbery.

Ashhurst J. said, he was very averse to extend the law to cases not formerly considered as falling under the crime; but still the law should keep pace with the times, if it could be done without an extension of the principles on which it was founded. And he considered the principle which governed the offence of robbery to be, where money was taken from another against his will under such circumstances of violence or terror as did not leave him a free agent. That in burglary such constructions had taken place as were necessary to meet the frauds by which the law was endeavoured to be evaded. Breaking and entering a house, in common acceptation meant the breaking of a door or window, and going into

into the house: but yet it had been construed to extend to breaking a pane of glass, and putting in the hand of the person. The same latitude had taken place in the construction of this offence. The case of a man taking money to a robber, in consequence of an oath imposed on him by the latter, was a fear upon the mind only, and no fear of personal danger at the time. So here, if the prosecutor were not in fear of his life, yet if he were induced to part with his money under a fear for his character, it was a terror on the mind, and amounted to robbery. Ch. XVI. § 130. *Fear, of what nature.*

Blackstone J. said, that the difficulty of the case was in drawing the line for the first time. That Jones's case was law; but it turned on the circumstance of force and violence, which gave a reasonable apprehension of immediate danger. There was a threat to deliver the party up to the mob as a sodomite, besides the circumstance of laying hold of his arm. That to constitute robbery there must either be violence or a putting in fear of it. There was no case in which one or the other had not been holden necessary. The primary idea of robbery was, that the act must be done with violence: putting in fear was only a constructive consequential violence. But the principal question was, What it should be a fear of? and he thought the menaces or apprehension must be of violence likewise. If that line were departed from, there was no telling where to stop. If this species of fear were holden sufficient, any other may be so. That duress *per minas* was defined to be fear of life or bodily harm. Bracton said it must be such a fear as would fall *in constantem virum;* and 2 Inst. 483. was to the same effect. Threatening to burn a man's house was no duress. That as to the case put of threatening the life of a child, it would be a clear violence on the parent or guardian. The violence egressus est è personâ; and death might ensue from non-compliance. If the fear were of such a nature, to avoid the effects of which the true man might kill the person, that would be robbery. But that if the threats were of a more peaceable kind, as to strip his estate, or the like, it would not be robbery. That none of those consequences followed in the case of threats to disgrace, as in case of threats of violence. That taking by violence or against the will of the party were

Ch. XVI. § 130. *Fear, of what nature.*

not synonymous terms. That as to the threat of taking the prosecutor before a magistrate, although it were a threat of corporal violence, he did not think it was alone a sufficient reason for distinguishing the other cases from the present, or to make it a robbery: for if it were not sufficient to threaten to prosecute, it could not be so to lay hold of a man for the purpose of prosecuting him; and he did not think it so material what the prosecutor apprehended, as what he had reason to fear. As to the case of the oath, he did not know how to give an answer to it: if it were new, he should not think it law; but it was established. Finally however, after hearing the opinion of the other Judges, he changed his own, and concurred with them that it was robbery. He thought that the threat of immediately taking the prosecutor before a magistrate was a strong circumstance; but he still doubted upon those cases where there was a demand without any threat or violence.

Willes J. said, he was under less difficulty of giving his opinion on this case, than he should be to draw the line what threat should or should not be sufficient in robbery. That there must be a felonious taking and an actual or constructive violence to constitute robbery. As to the felonious taking, the circumstance of a stranger's calling upon a young man unknown to him in the street to give him a present, and threatening him if he refused, left no doubt of his felonious intent to take money from the prosecutor, which he obtained by means of such threats. (In allusion to many cases which had been urged by the prisoner's counsel, of money obtained from others by threats of various sorts; as to discover to an husband that the party had committed adultery with his wife; to inform a schoolmaster or military officer of offences committed by a boy or soldier, and the like;) he observed, that no precise answer was necessary to be given; they must depend upon circumstances, and especially upon the question, Whether any antecedent felonious design existed in the person obtaining money by such means. That as to the question, whether there were any actual or constructive violence; the idea of actual violence here must be given up, because there was no touching of the prosecutor's person. But he thought there was a constructive violence.

violence. That the threat of taking him immediately before a magistrate was, under those circumstances, a threat of raising the mob on him. That the law was very liberal in constructive burglaries for the prevention of the offence; as making use of false pretences to get into the house, or fraudulently suing out the process of courts, &c. or prevailing on a child by fraud to open the door. The laying of hands on the party he thought made no difference. That in Jones's case, which was very deliberately considered, that circumstance was not relied on: that this was as much a violence in reality on the party: and constructive violence supplied the place of actual violence. Ch. XVI. § 130. *Fear, of what nature.*

Gould J. said, that he was much disposed to close with the opinion thrown out that money obtained under a terror imposed by a charge either affecting life or corporal punishment, would amount to robbery. Robbery originally meant an actual and violent taking immediately from the person; but in process of time the Judges found it necessary to supply the place of an actual taking from the person; and a taking in his presence was holden to be the same thing. That there were many other cases of constructive taking mentioned in Francis's case. That when a man *animo furandi* demanded money, whether he said, "give me your money," "make me a present," or words of the same import, it was robbery. In Crompt. Just. 31. *b.* a demand of money, and obtaining it without a weapon or force used, was holden to amount to robbery. The grounds were the demand of the offender *animo furandi*, and the apprehension in the party's mind that force would follow; which supplied the place of actual force. It was comprehended in the language and demand that force would be used. If nothing more had been said to the prosecutor than that he had better comply, it would have been a robbery: but besides, there was a threat to take him before a magistrate. That there was no authority which said that a battery was necessary: that an illicit demand of money *animo furandi* was an assault; and a threat to take a party before a magistrate was a threat of actual force. The prisoner threatened to use that force which he was master of to force and drag the prosecutor before a magistrate. Com. Rep. 478.

Lord

Ch. XVI. § 130. *Fear, of what nature.*

Lord Ch. Baron *Skynner* thought there was sufficient evidence of a felonious assault to make the party deliver his money, so as to amount to robbery. The attack implied violence, and menaces equal to violence amounted to such in construction of law; and if they answered the purpose, came within Lord Hale's definition of robbery. That the menace in question was most likely to produce the effect of compelling the prosecutor to part with his money: no menace being better calculated to unman the mind as had appeared in so many instances.

Lord Ch. J. *De Grey* said, that as far as this case went he had no difficulty, and beyond that he thought it unnecessary to give any opinion. It was agreed that actual force or terror was necessary to constitute robbery. Actual force perhaps there was none in this case; but there was terror. He thought it extraordinary that no case had decided of what nature the terror must be. Mr. Justice Foster had said, there must be violence or terror for the safety of the person, but he did not say that the fear must proceed from the person threatening: If there were a fear for the person of the party, he considered that sufficient. That there was no necessity for a weapon drawn was a rule well laid down by Hawkins and Lord Hale; and the assault spoken of by them was evidently a constructive and not an actual assault. That Lord Hale did not seem to think it necessary there should be a terror of life. So it appeared from Harman's case, where the reason alleged why it did not amount to robbery was because the fear arose after the purse was taken; which afforded a fair inference that it was of such a nature as would have constituted robbery, if the money had been delivered in consequence of it. That here the prisoner's intent was clearly felonious, and the mean he employed to obtain the money was a threat of danger to the prosecutor's person, if he did not comply. If he refused, he was to be carried before a magistrate by force. The threat implied that the offender would swear to the truth of the charge; the necessary consequence of which was commitment; and if the charge were believed on the trial, the punishment was corporal. That it would be dangerous to say how far the terror must extend, or what was such as might fall *in constantem*

Post. 726. 736.

stantem virum. In cases where no weapon was used there might really be no terror. However the case in question clearly amounted to robbery. Suppose a threat to shoot a man's wife or children at a little distance from him, must he not be in terror? He reserved giving any opinion as to the cases of threats to destroy a man's house or property; but thought that the expression of a man's not being left a free agent was too loose and ambiguous. The rule he would adhere to was that expressed in Hale and Hawkins. There was no ground, however, to warrant laying it down as a general rule, that the danger must arise from the person threatening: nor could he agree that there must be a well grounded terror; though if it were necessary, he thought this was such; and he was clearly of opinion that the case amounted to robbery. Ch. XVI. § 130. *Fear, of what nature.*

Lord *Mansfield* C. J. was of opinion, that the true nature and original definition of robbery was a felonious taking of property from the person of another by force: in which there were three things to be observed: first, That it must be done feloniously, which went to the intent of the taker. Secondly, That it must be taken from the person of another. Thirdly, That it must be taken by force. That all the rest which was to be found in the books on this subject formed no part of the definition of the offence, but arose from legal construction, in order to prevent an evasion of the law. That as to the felonious intent there could be no doubt: whatever was done afterwards was the mode of executing the intent. That if the construction of the law had been confined to a literal adherence to the definition of robbery, many ways of avoiding it would have been left open. If a man were knocked down and his money taken from him while he remained insensible, that would fall within the true definition of robbery, although there could be no fear existing in the mind of the party robbed. Again, if the owner threw down his money, or had it not about his person at the time, though it were in his presence; these by construction have been holden to be equivalent to an actual taking from the person. So as to the force, constructive force was equivalent to actual force. If the owner delivered his money, or were made to stand still whilst the thief took it

Ch. XVI. § 130. *Fear, of what nature.*

it up, that amounted in construction of law to a taking by force; because it was the effect of terror operating on the mind which induced his acquiescence: and if the property were delivered or suffered to be taken by the owner through terror impressed on his mind, and in order to get rid of that terror, it was a taking by force, and amounted to robbery. That it was clear that no actual danger to the owner need exist: for if a tinder-box or candlestick were used instead of a pistol, it was still robbery. That here the strongest personal force was used. The prosecutor was accosted by a person whom he had never seen before: he discovered him to be a villain: the stranger demanded a present: that alone would have been sufficient; but he went further, and told the prosecutor that *he had better* comply with the demand: that was a threat. Then he threatened he would carry him before a magistrate. Was the prosecutor bound to believe that he was in his way to the magistrate, or that the prisoner would go no further than he threatened? He thought this was a threat of personal injury. The instance of terror mentioned in Hale was not so strong as this: the purse was taken there without the owner's knowledge: and upon his afterwards seeing it in the thief's hand, and demanding it, the latter said, "Villain, if thou speakest of thy purse, I "will pluck thy house over thy ears, and drive thee out of "the country, as I did John Somers." This, said Lord Hale, was ruled not to be robbery; because the *words of menace* were used after the taking of the purse. From thence it was plainly to be inferred, that it was such a menace as, had the purse been obtained by means of it, would have amounted to robbery. That in truth when a villain came and demanded money, no one knew what he would do: and when it was obtained by threat, it was a constructive violence. That it was manifest that the mode adopted by the prisoner was a mere evasion, as he supposed, of the law, and intended as such: his primary intent was to obtain money by a highway robbery. Ultimately all the Judges held that it was robbery.

Post. 736.

O. B. May 19th, 1779, Sess. Pap. No. 5, p. 3, Serjt. Forster's MS.

In the May session following, Willes J. in giving judgment, after noticing the definition of robbery by Lord Hale and others to the same effect, observed that the following ingredients

ingredients were necessary to constitute that offence: 1. A felonious intent, or *animus furandi*. 2. Some degree of violence or putting in fear. 3. A taking from the person of another. He observed that he should confine himself to shew that the prisoner's offence came within the above description, as the Judges did not mean to draw the line as to what should or should not constitute robbery; and therefore they declined giving an answer to the cases put by the prisoner's counsel; saying that every case must depend upon its own circumstances; but that the facts in this case warranted them in saying; as to the first point, that there was a felonious intention in the prisoner to rob the prosecutor. Upon the second point, that the putting in fear was not necessary to be laid in the indictment; so that the fact were charged to be done violently and against the will of the party. Nor was the circumstance of actual fear necessary to be proved; but that the law, *in odium spoliatoris*, would presume it. In like manner it had often been holden that actual violence was not necessary, but that constructive violence was sufficient: for where such a terror was impressed on the mind as did not leave the party a free agent; and in order to get rid of that terror, he delivered his money, it was robbery. It was also clear that no actual danger was necessary; for a man might commit a robbery without having any offensive weapon; and though a tinder-box or candlestick were used. For when a villain came and demanded a man's money, no one knew to what length he would proceed. That here the situation of the prosecutor was that of a young gentleman accosted at night in the street by a stranger, whom he had never before seen, and must have suspected to be a villain, who demanded a present. Even that seemed sufficient; but the stranger went on and told him that he had better comply, &c. That was a threat of a personal injury; for he had every thing to fear, in being dragged through the streets as a culprit charged with an unnatural crime. That, therefore, was a reasonable fear; which might operate *in constantem*, as well as *in meticulosum virum*. It had, he said, been urged on behalf of the prisoner, that this was a fraudulent extorting, and not a taking by violence. But in many cases fraud would supply the want of violence;

Ch. XVI. § 130. *Fear, of what nature.*

(1 Leach, 231. more at large.)

Ch. XVI. § 130. *Fear, of what nature.*

violence; as in the case of burglary, where breaking was necessary to be laid in the indictment, and yet getting admission into a house under colour of law or pretence of taking a lodging or business had been often holden sufficient evidence of the breaking into the house. But the Judges, he observed, did not entirely determine this case on that ground, but were of opinion that there was proof of a constructive violence, which they thought was sufficient. As to the third point, that there was clearly a taking from the person; though a taking in the presence of the party would have been sufficient. After citing the above-mentioned cases of Jones, Brown, and Harrold, he observed that in those cases there was this difference from the present, that there was some actual violence proved, as taking by the collar or arm: but that the Judges all held that that did not make any material distinction, but that sufficient was proved in this case for the jury to find the prisoner guilty of robbery.

Ante, 714, 715.

Staple's case, O. B. 1779.

In the October sessions following, John Staples was convicted of a similar offence, and executed.

Hickman's case, O. B. July 1783, MS. Buller J. MS. Crown Cas. Res. and MS. Jud.

It is robbery to extort money from a person by threatening to charge him with an unnatural crime; though he parted with his money only from fear for his character and from no other fear.

O. B. Feb. 1784, Sess. Pap. p. 295. (S. C. 1 Leach, 310.)

Daniel Hickman was indicted for robbing John Millard in St. James's Palace of two guineas. He obtained the money from the prosecutor by charging him with a similar crime as in the foregoing cases; and by threatening that if he did not make him satisfaction he would bring a serjeant and a file of men to take him up before a magistrate. The prosecutor swore that he parted with his money for fear of losing his character, and that he had no other fear. The jury found the prisoner guilty: but as some on the bench thought that this case differed from that of Donally, it was reserved for the opinion of the Judges; who in November 1783 were all of opinion that it was robbery. Ashhurst J. afterwards delivered their opinion; that this did not materially differ from the case of Donally; for that the true definition of robbery is the stealing or taking from the person or in his presence property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property: and that whether the terror arose from real or expected violence to the person, or from a sense of injury to the character, the law made no kind of difference: for to most men the idea of losing their fame and reputation was equally

equally if not more terrific than the dread of personal injury. That the principal ingredient in robbery was a man's being forced to part with his property. And that the Judges were unanimously of opinion, that upon the principles of law and the authority of former decisions, a threat to accuse a man of having committed the greatest of all crimes was a sufficient force to constitute the crime of robbery by putting in fear.

Ch. XVI. § 130. *Fear, of what nature.*

§ 131. *On threat to burn house.* R. v. J. Astley and E. Astley, Stafford Sum. Ass. 1792, cor. Grose J. MS. Buller J. and MS. Jud.

No case however has gone further than a very recent one of James and Ezekiel Astley, who were indicted for robbing Jonathan Grundy. It appeared that the prisoners and a person unknown went to a public house near Birmingham, during the time of the late riots, which was three or four hundred yards from Mr. Grundy's house, early in the morning, where one of them said that they were going up to Mr. Grundy's house, "and if he did not turn out the whack, his house would be down by two o'clock in the morning;" on which the stranger observed that he himself would do it; that he was the head of the mob, and had 3 or 400 men at command at any time; with other like discourse. They all departed towards Mr. Grundy's house; but before they arrived there they saw his servant at a little distance from it, whom they accosted: James Astley telling him he was come as a friend to let Mr. Grundy know that this man (the stranger) was the head of the mob, and the first man who had entered all the places which were destroyed at Birmingham. They then seeing Mr. Grundy come out of his house, pulled off their hats, and shouted Church and King. Mr. Grundy did the same, advancing towards the prisoners in much alarm, when the stranger accosted him, saying, "I am come out of friendship to you, Mr. Grundy, to let you know your house is marked to come down to-morrow morning at two o'clock. I am the head of the mob: they are 2000 strong in Birmingham. I must have something to make my men drink. I can bring 2 or 300 in an hour's time, or keep them back." Mr. G. said, "As to something to drink, you shall have any thing you have a mind for." The stranger said, "I must have money." Mr. Grundy pulled out half-a-crown from his pocket, and offered it to him; but the stranger refused

The prisoners threatened to bring a mob from Birmingham (then in a state of riot and disturbance), and burn the prosecutor's house down if he did not give them money, which he did under fear of that threat; held robbery.

Ch. XVI. § 131. *Fear, of what nature.*

it, and turned away with expressions of contempt. Mr. Grundy then asked what he wanted; the stranger replied, he must have 20 guineas; and on Mr. Grundy saying that he had not so much in his house, the other told him, that if he did not give him something handsome for his men to drink, his house should come down. Mr. Grundy said, that he might have 9 or 10 guineas, which the stranger asked to see: and as Mr. Grundy was taking his purse out of his pocket, James Astley told him he might depend upon it that the other man was the head of the mob, and the like sort of discourse which had passed before concerning his power; particularly, that he was the first man who had entered every house that had been destroyed. Mr. Grundy was so struck with that expression that he immediately took the money out of his purse (9 guineas and a half,) which he gave to the stranger; who counted it, and demanded to have something to drink. They all went then into Mr. Grundy's house, where they had liquor, and in going away assured him that he should be protected. Mr. Grundy said, that he was greatly alarmed, but not for his person: that no injury was threatened to his person: that when he delivered his money his apprehension was, that if he had refused so to do, the prisoners would have gone to Birmingham, and have returned with other persons, and pulled down his house and plundered it before he could have removed his wife, who was in the house in great agitation, as the prisoners had threatened, and in the same manner as different houses in Birmingham had been before pulled down. It appeared that the prisoners had a small share of the money afterwards. It was objected on their behalf, that there was no evidence of robbery, inasmuch as the prosecutor did not deliver his money from any immediate fear of danger to himself or his property, but from an apprehension of future injury to his house by pulling it down. And the counsel for the Crown admitting it to be a new case, Grose J. proposed to have a special verdict found; but on account of the prisoners' situation, it was agreed that the truth of the evidence should be left to the jury, and if they should find the prisoners guilty, the judgment should be respited, and the facts submitted to the Judges for their opinion, whether the evidence amounted to robbery. The jury found

found the prisoners guilty; saying that they were satisfied that Mr. Grundy did not deliver his money from any apprehension of danger to his life or person, but from an apprehension that if he refused, his house would at some future time be pulled down, as the prisoners and the stranger threatened, in the same manner as other houses in Birmingham had been before. In Michaelmas term 1792 a majority of the Judges held this to be robbery (*a*).

Ch. XVI. § 131. *Fear, of what nature.*

I find a note of a case very similar to the above determined by the Judges in 1773. One Simons, who had been a ringleader in the late riots among the tinners in *Cornwall*, came with above seventy of his companions to the house of one Thomas Rowe, and said, they would have from him the same as they had had from his neighbours, which was one guinea, else they would tear down his mow of corn and level his house. He gave them a crown to appease them; the prisoner swore he would have 5*s*. more, which Rowe, being terrified, gave him. They then opened a cask of cider by force, and drank part of it, and eat his bread and cheese, and the prisoner carried away a piece of meat. He was indicted for robbing Rowe of 10*s*. in his dwelling-house by assault, and putting him in fear. But there was also another count, for putting the prosecutor in fear, and taking from him in his dwelling-house a quantity of cider, pork, and bread: and it was holden robbery in the dwelling-house.

R. v. Simons, East. T. 1773, Serjt. Forster's MS. *vide* another case against the same prisoner on a different indictment. Ante, p. 712. *On threat to tear down corn and level house, &c.*

Another case of the like sort occurred upon the trial of some of the rioters in the year 1780. The indictment was for robbing the prosecutor Daking in his dwelling-house; into which Daking swore that the prisoner William Brown and another man entered; and being asked by him what they wanted, Brown having a drawn sword in his hand said with an oath, "Put one shilling into my hat, or I have a party that can destroy your house presently:" on which the prosecutor gave him a shilling. *Another witness* present swore, that the prisoner also used the expression, that "if he (Daking) would keep the blood within his mouth, he must give the shilling." The offence was holden to be robbery.

Brown's case, O. B. June 1780, cor. Nares J. MS. Buller J.

(*a*) Qu. If the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers?

All

Ch. XVI. § 131. *Fear, of what nature.*

All these however were cases of urgency: the threats were of immediate, or speedy and signal mischief, and the execution of them could not have been impeded by any ordinary prudence or firmness, or by any recurrence to the protection of the law. But the following case is of another description.

Rex v. Wood and Knewland, O. B. Jan. 1796, cor. Heath J. MS. Jud. *Persons under pretence of an auction get a woman into a house and compel her, by threats of carrying her before a magistrate and to prison for not paying for a lot pretended to have been bid for by her, to pay them 1s. through fear of prison, and for the purpose of obtaining her liberty, but without fear of any other personal violence: held duress and not robbery.*

Nathaniel Wood and James Knewland were indicted for robbing Sarah Wilson in the dwelling-house of Knewland. Upon the evidence it appeared that as the prosecutrix was passing by the door of an auction-room in the Strand, she was solicited by Wood to enter, and on her repeatedly declining it he pushed her into the room, in which about twenty persons were assembled. Here she was much pressed to bid for some articles, which she refused, alleging the force which had been put upon her; and attempted to quit the room; but this was prevented by the company: when finding she could not otherwise obtain her liberty she bid 6*d.*, and again attempted to depart; but was prevented by Knewland. And the auctioneer having knocked down the goods at 14*s.* 6*d.* Knewland said they were her's and he must have the money as they were knocked down to her. On her again complaining that she had been forced into the room, and protesting that she had not the money, Knewland said, if she could not pay all she must leave her bundle, or pay half-a-guinea till she could raise the remainder. She however refused both: on which he said, *that she should go to Bow-street, and from thence to Newgate, there to be imprisoned till she could raise the money.* He then ordered the door to be shut and a constable sent for. The prisoner Wood soon after entered with a pretended constable, who was directed by Knewland to take her to Bow-street, and from thence to Newgate. The constable insisted on being paid for his trouble, and threatened to take her away unless she paid 1*s.*, Knewland all the while having one hand on her shoulder and the other on her bundle. She then paid the constable 1*s.*, *being in bodily fear of prison*, for the purpose of obtaining her liberty. Being asked whether she were not impressed with fear by Knewland laying hold of her and her parcel, she answered in the negative; saying, *that she only parted with her money to avoid being carried to Bow-street, and from thence*

to

to Newgate; and not out of fear or apprehension of any other personal force or violence. The Jury were directed, that if they believed this to be a combination and conspiracy of the prisoners to procure the money of the prosecutrix under the pretence of an auction, they should find them guilty; which they accordingly did. And the question was reserved for the opinion of the Judges, Whether the facts stated amounted to robbery? In Hilary term 1796, eight Judges being assembled, the conviction was holden wrong: considering this as the case of a simple duress, for which, according to all the books, the party injured had a civil remedy by action, which could not be if the fact amounted to felony. In the course of the debate Grose J. observed, that though he did not agree with the Birmingham case, where money obtained by a threat to bring a mob and burn the prosecutor's house was holden to be robbery; yet if that were law he could not distinguish this case from it on principle. But Eyre C. J. said, that this was very different from the Birmingham case; and nothing more than simple duress. That the question in such cases for the jury was, Whether the money were delivered under the impression of terror? If the terror were of such a kind as to disable the party from resistance, it was a taking by force. But that was not the case here. The prosecutrix had a choice of difficulties, and chose to pay her money rather than undergo the trouble of being carried before a magistrate.

Ch. XVI. § 131.
Fear, of what nature.

(Absent Ashhurst J. Hotham B. Perryn B. and Buller J.)

R. v. Astley, ante, p. 729.

In the February following, the opinion of the Judges was delivered by Ashhurst J.; in the course of which he observed, that there was no reason for such a degree of terror in this case as to induce the prosecutrix to part with her money; she might have known that having done no wrong, if she had been taken to prison, the law would have taken her under its protection and set her free. And that the law did not allow the fear of being sent to prison to be a sufficient ground of terror to constitute a robbery.

Feb. 1796, O. B. Sess. Pap. p. 408. (S. C. 2 Leach, 833.)

§ 132.
Where no force, there must be terror in fact.

If the property be not taken by actual violence, but the owner deliver it in consequence of prior threats, such delivery must be enforced by terror actually felt at the time; otherwise there is neither actual nor constructive violence in the

Ch. XVI. § 132. *Fear in fact, where no violence.*

the taking, and consequently no robbery. By this principle the case before mentioned of delivering money upon a compulsive oath must be governed.

Vide ante, s. 129. Reane's case, O. B. June 1794, cor. Perryn B. MS. Jud.

If the property be not taken by violence nor parted with thro' fear, it is no robbery, though there were sufficient legal and reasonable ground for fear, as upon a threat to charge one with an unnatural crime.

James Reane and another were indicted, the one for a robbery on the highway, the other as accessary before the fact. The prosecutor deposed, that on the 19th of May 1794 he met the prisoner Reane, who was an entire stranger to him, in the street, who asked him for money, and said he was in great distress. The prosecutor did not give him any thing, and left him muttering something which he did not distinctly hear. The next day, meeting Reane again in the street, he again asked for money; and being refused, told the prosecutor it should be worse for him. A few days afterwards Reane accosted the prosecutor again in the street, and talked of his having committed indecencies with him, and that somebody had seen it. The prosecutor said he knew not what he meant, and went away. The next day he received a letter from Reane containing the like insinuation, and mentioning his place of residence; in consequence of which the prosecutor was induced to write to him, appointing to meet him in the street to hear what he had to say. He accordingly met him there, when Reane told that he could prove that he had committed indecencies with him in the Park, and that a third person had seen it. The prosecutor was struck with the charge. At the same time the other prisoner Watkins came up to them and repeated the same charge, of which he said he had been the witness. The prosecutor then observed to them that it was a horrid charge. On which Watkins said, "You have great interest with the present Government; and I should be glad of a place in the customs or excise, or where clerks were." The prosecutor said he would get him one, and Watkins went away. Reane then said, "You have given that man a certainty; I will have one too." The prosecutor answered that he should. The next day Reane told him that he had considered what he would have, which was 20*l.* and a bond for 50*l.* annually. The prosecutor replied that he could not do it then, but if he would wait a few days he would bring him the money and the bond. He afterwards met Reane and offered him the money, which he would not

not take without the bond; upon which the prosecutor gave him both. This was the substance of the transaction. The prosecutor further deposed, that at the beginning of the business he apprehended injury to his person or character; but at the time when Reane took the money and bond he had no such apprehension, but parted with both for the purpose of bringing the prisoners to justice, and with that view only. That he did not deliver the money voluntarily, nor should have parted with the money or bond unless for the several applications which had been made to him by the prisoners, but that he was under no fear or apprehension when he parted with them. It was objected on the part of the prisoners, that to constitute robbery there must be violence or fear of danger to the person or character, and that such violence or fear must exist at the time when the money was parted with; which did not exist in this case: and further, that Reane had been entrapped into the commission of the offence. The prisoners, however, were found guilty; but judgment was respited to take the opinion of the Judges upon the case. In Trinity term 1794 the Judges (absent Buller J.) inclined to think that this was not robbery; there being neither violence nor fear at the time when the prosecutor parted with his property. Eyre C. J. observed, that it would be going a step further than any of the cases to hold this to be robbery. The principle of robbery was violence: where the money was delivered through fear, that was constructive violence. That the principle he had acted upon in such cases was, to leave the question to the jury, Whether the Defendant had by certain circumstances impressed such a terror on the prosecutor as to render him incapable of resisting the demand? Therefore when the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoners, he negatived the robbery. That this was different from Norden's case, where there was actual violence: for here there was neither actual nor constructive violence. A man might be said to take by violence who deprived the other of the power of resistance, by whatever means he did it. And he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the Judges of a man holding

Ch. XVI. § 132.

Fear in fact, where no violence.

Ante, 666.

Ch. XVI. § 132. *Fear at the time of the fact.*

holding another's child over a river and threatening to throw it in unless he gave him money. The Judges, however, thought the matter deserving of further consideration. But in Hilary term 1795 (absent Buller J.), they held the conviction wrong; there being neither actual nor constructive violence.

§ 133. *Fear after the taking not sufficient.* Harman's case, Hil. 17 Jac. 2. Roll. Rep. 154. 1 Hale, 534. Ante, 726.

It is not enough that the fear arise after the property is taken. Harman being on horseback desired Halfpenny to open a gap for him; and while he was so doing, Harman took the opportunity unperceived to pick his pocket of his purse. Halfpenny turning round and seeing the purse in Harman's hand, demanded it of him, who then menaced Halfpenny (in the manner before mentioned) and went away with the purse. On an indictment for robbery, the prisoner was holden guilty of simple larceny only; the property being obtained by stealth, and not by violence or putting in fear; the words of menace being used after the taking.

IV. *Of Grand and Petit Larceny and Robbery, and their Punishments.*

1. *Grand and Petit Larceny.*

§ 134. *Grand and petit larceny.* 1 Hale, 503. 530. 2 Inst. 189. 2 MS. Sum. 255. Staundf. 24. b. *Vide* Ld. Lytt. Hist. of Hen. 2. 1 vol. qto. 470. 4 Blac. Com. 229. 238. (*Vide* st. Westm. 1. c. 15. and Westm. 2. c. 25.) Hale ut supra, & 517. 4 Blac. Com. 237.

In grand larceny the value of the property taken must be above 12*d.* If it be only of that value or under, it is but petit larceny: and in these prosecutions the valuation ought to be reasonable; for when the stat. of Westm. 2. c. 25. was made, silver was but 20*d.* an ounce, and at the time Lord Coke wrote, it was worth 5*s.* and it is now higher (*a*). The nature of the offence is the same in both; they are both felony, though they differ in the degrees of their punishment, and in some other particulars. At common law the judgment for grand larceny is of death, but the party may pray the benefit of his clergy, unless in cases

(*a*) I am informed that the average price of late years has been about 5*s.* 3*d.* but in the course of the last war it rose at times to about 6*d.* more.

where

where he is ousted by particular statutes, which have been already noticed: and he shall also lose his goods. In petit larceny the offender was only subject to whipping, or other corporal punishment less than death, by which is now understood imprisonment: and in this case also the party forfeits his goods on conviction. But in robbery, whatever be the value, the judgment is of death. But though every larceny include a trespass, yet upon an indictment for larceny, if the taking appear not to be felonious, though amounting to a trespass, the Defendant is entitled to a general acquittal. Ch. XVI. § 134. *Grand and petit larceny.* 3 Inst. 69. 218. 2 MS. Sum. 257. 1 Hale, 531, 2. 2 Hale, 349. 1 Hawk. ch. 34. s. 9. Ante, s. 125. Joiner's case, O. B. 1664, Kel. 29.

§ 135. *By statute.*

In the punishment of grand and petit larceny several alterations have been introduced by statute, many of which have been already enumerated in some of the preceding divisions of this head of offences. To which may be added in this place the general statute of the 3 W. & M. c. 9. s. 2. which enacts, that "if any person or persons be indicted "for any offence, for which by virtue of any former statute "he or they are excluded from the benefit of clergy, if he "or they had been thereof convicted by verdict or confes- "sion; if he or they shall stand mute, or will not answer "directly to the felony, or shall challenge peremptorily above "20, or shall be outlawed thereupon, he or they shall not be "admitted to the benefit of clergy." This does not extend to larcenies which have been ousted of clergy by subsequent statutes. 3 W. & M. c. 9. s. 2. *Standing mute, &c. ousted of clergy, where offender before ousted on conviction.*

By the stat. 18 Eliz. c. 7. s. 3. persons to whom clergy is allowed, may, for their further correction, be imprisoned for any time not exceeding a year, in the discretion of the justices before whom such allowance is had. 18 Eliz. c. 7. s. 3. *Imprisonment not exceeding a year.*

The stat. 5 Ann. c. 6. s. 2. enacts, "that where any per- "son or persons shall be convicted of any theft or larceny, "and shall have the benefit of this act allowed thereon, or "ought, by the laws in force before the making of the said "act (*a*), to be burnt in the hand for such offence, shall be "burnt in the hand as formerly; and the judge or justices, "before whom such offender or offenders shall be tried and "convicted, shall also at their discretion adjudge that such 5 Ann. c. 6. *Burning in the hand, and commitment to the house of correction.*

(*a*) The first section of this act repeals the stat. 10 & 11 *W.* 3. c. 23. which subjected certain offenders guilty of thefts or larcenies, who were allowed their clergy, to be burnt on the left cheek instead of the hand: which is the act here referred to.

Ch. XVI. § 135. *Grand and petit larceny.*

" offender, &c. shall be committed to some house of correc-
" tion or public work-house within the county, city, &c.
" where such conviction shall be, there to remain for any
" time not less than six months nor exceeding two years, to
" be accounted from such conviction; and such offenders
" shall be there kept at hard labour during such time as
" shall be so adjudged and recorded:" and in case of refusal or neglect to labour as they ought, the master or keeper of such house, &c. is required to give them due correction. By s. 3. in case of escape a method is pointed out of inflicting further punishment on the delinquent. Under this stat. the Judge has a discretion whether he will imprison at all or not.

Ex parte Brownsell, B. R. Tr. 18 G. 3. 2 MS. Sum. 257.

Transportation. 4 Geo. 1. c. 11. s. 1. *Vide* ante, s. 10.

By stat. 4 Geo. 1. c. 11. " where any person or persons
" shall be convicted of grand or petit larceny, or any felonious stealing or taking of money or goods and chattels, either
" from the person or the house of any other, or in any other
" manner, and who by law shall be entitled to the benefit of
" clergy, and liable only to the penalties of burning in the
" hand or whipping (except persons convicted for receiving
" or buying stolen goods, knowing them to be stolen), it shall
" and may be lawful for the court before whom they were
" convicted, or any court holden at the same place, (or holden
" at any other place for the same county, &c. by stat. 6 Geo.
" 1. c. 23. s. 1. with the like authority,) if they think fit, in-
" stead of ordering any such offenders to be burned in the
" hand or whipped, to order that such offenders shall be
" sent to some of his Majesty's colonies and plantations in
" America, for the space of seven years." And the same courts shall have power to make over such offenders by order of court to the use of any person who shall contract for their transportation. And now by stat. 19 Geo. 3. c. 74. s. 1. when any persons are convicted in England or Wales of grand or petit larceny, or any other crime punishable by transportation to America, the Court may, if it thinks fit, order them to be transported to any parts beyond the seas, either in America or elsewhere, not exceeding such terms as they were liable to be transported for to his Majesty's colonies in America.

19 Geo. 3. c. 74. *Vide* general title *Transportation.*

And

And by s. 27. of the stat. 19 G. 3. c. 74., "for the more se- Ch. XVI. § 135.
"vere and effectual punishment of atrocious and daring offen- *Grand and petit larceny.*
"ders, where any male person at any session of oyer and ter-
"miner or gaol delivery to be holden for London, or any *Hard labour in the hulks.*
"county in England, or for the royal franchise of Ely, or at
"any great session for the county palatine of Chester, or within
"the principality of Wales, shall be lawfully convicted of
"grand larceny, or any other crime except petit larceny,
"for which he shall be liable by law to be transported to
"any parts beyond the seas, it shall and may be lawful for
"the court before whom he shall be so convicted, or any
"court holden for the same place with like authority, if it
"thinks fit, in the place of such punishment by transporta-
"tion, to order and adjudge that such person, appearing to
"be of competent age and free from any bodily infirmity,
"shall be punished by being kept on board ships, &c. (i. e.
"the hulks), and be employed in hard labour, &c. in the
"Thames, or any other navigable river or port, &c. in Eng-
"land appointed by his Majesty in Council, &c. for such term
"not less than one year, nor exceeding five years; or in
"case such offender shall be liable to be transported for 14 See other general provisions, tit. *Felony*, &c.
"years, not exceeding seven years, as such court shall or-
"der and adjudge."

And by the same stat. s. 3. "when any person shall, in any of *Fine in lieu of burning;*
"the courts beforementioned (*a*), be lawfully convicted of any
"felony within the benefit of clergy, for which the party is li-
"able to be burned in the hand, it shall and may be lawful for
"the court before whom any person shall be so convicted, or
"any court holden for the same place with the like authority,
"if they think fit, instead of such burning to impose upon
"such offender a moderate pecuniary fine: or otherwise it *or whipping in lieu of burning, except in manslaughter.*
"shall be lawful, instead of such burning (except in case of
"manslaughter), to order and adjudge the offender to be
"whipped publicly or privately, once or oftener, but not ex-
"ceeding three times; such private whipping to be in the
"presence of not less than two persons besides the offen-
"der and officer who inflicts it; and in case of females, in
"the presence of females only;" and such fine or whip-

(*a*) i. e. "at any session of oyer and terminer, or gaol delivery, or at any "quarter or general session of the peace, &c. within England, or at any "great session for the county palatine of Chester, or within the princi-"pality of Wales."

ping

Ch. XVI. § 135. *Grand and petit larceny.*

ping shall have the same legal effect as burning. And by s. 4. nothing in this act shall be taken to abridge the power of the Court to imprison (as before,) if it thinks fit.

By stat. 31 Geo. 3. c. 35. no person shall be an incompetent witness by reason of a conviction for petit larceny.

§ 136. *Whether grand or petit larceny.* Ante, 736.

I have before thrown out a hint touching the propriety of the jury's assessing a reasonable value on the goods stolen; besides which some other circumstances remain to be noted in drawing the line between grand and petit larceny. If two steal goods above the value of 12*d.* from the same person at the same time, this is grand larceny in both: for it is one entire felony, and both are guilty of the whole. But if the acts of each were several at several times, and the goods taken at each time of the value of 12*d.* only or under, though from the same person, and put in the same indictment; it is only petit larceny in each. And so it seems the practice is, if one steal goods of the same person at different times, of the value of 12*d.* or under each time, but altogether exceeding that value: for though some writers on the crown law consider that in strictness it amounts to grand larceny, yet that may be well doubted; for as no number of grand larcenies being distinct acts, which when added together would make such a sum as amounts to a capital felony if taken at one time, under certain circumstances of aggravation; if taken at several times, will, under the same circumstances, deprive the party of clergy; so no number of distinct petit larcenies amount to grand larceny. And so it was holden in Petrie's case, on an indictment on the stat. 12 Ann. c. 7. for stealing to the amount of 40*s.* in a dwelling-house. The prisoner was servant to the prosecutor, and had at different times purloined his master's property to a very considerable amount; but it did not appear that he had ever taken to the amount of 40*s.* at any one time: on this ground he was acquitted of the capital part of the charge by the direction of the Court. And the same point was ruled by Ashhurst J. in a subsequent case. But it may vary the consideration, if the property of several persons, lying together in one bundle or chest, or even in one house, be stolen together at one time; for there the value of all may be

2 MS. Sum. 256. 1 Hale, 530, 1. 1 Hawk. ch. 33. s. 32, 33. Staundf. 24. b.

R. v. Petrie, O. B. Jan. 1784, 1 Leach, 329.

Rex v. Farley, Surrey Lent Ass. 1786, 2 MS. Sum. 256. 1 Hale, 531.

be put together so as to make it grand larceny, or to bring it within a statute that ousts clergy, for it is one entire felony. Ch. XVI. § 136. *Grand and petit larceny.*

§ 137. *Jury to assess the value.*

It was said by Willes C. J. and Chapple J., that upon taking verdicts on indictments for larceny, the jury ought always to be asked as to the value; because if they did not find the value, it would be like taking a verdict in a civil action for the Plaintiff, without ascertaining the amount of the damages. For the value found by the jury ascertained the degree of the offence, whether it were grand or petit larceny, or whether it were grand larceny, excluded clergy or not. But that in cases of robbery, burglary, horse stealing, or the like, there could be no occasion to ask the question. Yet Lord Hale says, that if a man could possibly steal a horse worth only 12*d.*; or break a house in the day time and steal goods thereout only of that value, no person in the house being put in fear, (which would amount to robbery, and so the value be immaterial;) this would be but petit larceny, notwithstanding the stat. 5 and 6 Ed. 6.; for that statute altered not the nature of the offence, but takes away clergy where clergy was allowed before, namely, where the offence was capital as in the case of grand larceny. So if a man steal only 12*d.* out of another's pocket *clam et secretè*, there can only be judgment as for petit larceny; although the stat. 8 Eliz. c. 4. takes away clergy from that offence.

Atkinson's case, Lydia Hudson's case, O. B. Dec. 1740, Serjt. Forster's MS.

1 Hale, 531.

Ante, 634.

1 Hale, 531.

Uriah Pearles was indicted for stealing a bay gelding of the value of 23*s.* 6*d.* On the evidence it appeared to be a worthless animal turned upon a common, and as the witnesses said, fit only for a dog horse. Mr. Justice Foster recommended it to the jury to find the prisoner guilty to the value of 12*d.*; which they did; and he was transported.

Pearles's case, Bedford, 13th March 1755, Serjt. Forster's MS.

2. *Robbery.*

§ 138. *Robbery, clergy.*

In all cases of robbery from the person, whatever be the value of the property taken, the judgment is of death.

Vide ante, s. 134. 2 Hale, 349.

The stat. 3 W. & M. c. 9. s. 1. enacts, "That all and "every person or persons that shall rob any other person, "or shall comfort, aid, abet, assist, counsel, hire, or com- "mand any person or persons to commit such offence, be- "ing

3 W. & M. c. 9. s. 1. Ante, p. 629.

Ch. XVI. § 138. *Robbery, clergy.*

" ing thereof convicted or attainted, or being indicted " thereof and standing mute, or not directly answering, or " challenging peremptorily above 20, shall not have the be- " nefit of clergy.

1 Ed. 6. c. 12. s. 10. founded on 23 H. 8. c. 1. s. 3. & 25 H. 8. c. 3. s. 2. Ante, p. 625.

This statute is more general than the stat. 1 Ed. 6. c. 12. s. 10. which confines the description of the offence to " robbing any person in or near the highway," and ousts the principal of clergy, on attainder or conviction, or being indicted or appealed, and found guilty by verdict, or confession on arraignment, or not answering directly, or standing mute. The stat. 4 & 5 Ph. & M. c. 4. which follows the words of the stat. 1 Ed. 6. ousts of clergy the accessaries before (viz. such as " maliciously command, hire, or coun- " sel,") in all cases, including the challenging more than 20, which is omitted in the stat. of Ed. 6.; but which omission is expressly supplied upon indictment by stat. 3 & 4 W. & M. c. 9. s. 3.: and according to the reasoning of Lord Hale and Mr. Justice Foster, which has been before adverted to, the stat. 4 & 5 Ph. & M. will operate to take away clergy from the principal in all cases where it takes it from the accessary. But accessaries after in robbery have the benefit of clergy.

4 & 5 Ph. & M. c. 4. Ante, p. 627.

Ante, 631.

2 Hale, 350.

§ 139. *Robbery, &c. in another county.* 25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. 3 W. & M. c. 9.

By the stat. 25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. s. 2. and 3 W. & M. c. 9. s. 3. persons indicted of larceny in one county, and convicted or attainted thereof, or who upon their arraignment shall stand mute, or challenge peremptorily above 20, or shall not directly answer, shall lose the benefit of clergy, if it appear by evidence or examination at the trial, that the same felonies were robberies or burglaries in another county. These statutes, and the construction thereon, will be set forth at large in another place.

Post. s. 157.

V. *Of Principals, Accessaries, and Receivers.*

§ 140. *Principals and accessaries.*

The same general rules which govern in other cases respecting principals and accessaries apply also to these offences, and are therefore unnecessary to be repeated here. But the case of receivers of stolen goods being peculiar to the subject under

under discussion, this, and some particularities respecting principals and accessaries in these offences, require to be specially noticed in this place. Ch. XVI. § 140. *In aggravated larcenies.*

Though it be true that in larceny and robbery all those who come to steal or rob are principals, although the fact may be only committed by one of them, and are subject to the same punishment; yet it is otherwise as to larcenies deprived of clergy under particular circumstances; such as the case of stealing privately from the person, under the stat. 8 Eliz. c. 4. and 39 Eliz. c. 15. for breaking and entering a house, &c. and stealing to the value of 5*s.*; [though in the latter case the deficiency is supplied by the stat. 3 & 4 W. & M. c. 9.:] in which cases the abettors at the fact are not excluded from clergy, but remain liable only to the penalties of simple larceny. *In aggravated larcenies.* Fost. 356. Innis's case, 1 Leach, 9. Ante, s. 75. 119.

In petit larceny there can be no accessaries either before or after (*a*), although it be felony; because it is not such as judgment of death ought by law to be passed upon it: but procurers and counsellors are principals as in trespass. With respect to grand larceny, the common law respecting accessaries stands upon the same footing as in other felonies. But there is a description of accessaries after the fact peculiar to larceny which requires distinct consideration; and these are *In petit larceny.* 1 Hale, 530. 616. 2 Inst. 183. 12 Rep. 81. 2 Hawk. ch. 29. Cro. Eliz. 750. 2 MS. Sum. 414.

Receivers of stolen Goods.

At common law no receivers were accessaries but such as received or harboured the thief himself: the receiving of the stolen goods only did not make a man accessary, without taking a reward to favour the felon's escape. If the owner received back his goods simply and without any agreement to favour the felon in his prosecution, it was lawful: but if he received them upon an agreement not to prosecute, or to prosecute faintly, it was called theftbote, and punishable by imprisonment and ransom. But now by stat. 3 W. & M. c. 9. s. 4. "If any person or persons shall buy or receive "any goods or chattels that shall be feloniously taken or "stolen from any other person knowing the same to be "stolen, he or they shall be taken and deemed an accessary § 141. *Receivers.* 2 MS. Sum. 396. 1 Hale, 619, 620. 4 Blac. Com. 38. 132, 3. 3 W. & M. c. 9. s. 4. *Made accessaries after the fact to the felony.*

(*a*) Yet in R. v. Reddeard, E. 11 Ann. (De Grey's MS.) Powell J. said it was a vulgar error to think that petit larceny, or any felony, capital or not, may not have accessaries after the fact. Serjt. Forster's MS.

"or

Ch. XVI. § 141. *Trial and punishment.*

" or accessaries to such felony after the fact, and shall incur " the same punishment as an accessary, &c. after the felony " committed."

5 Ann. c. 31. s. 5.

The stat. 5 Ann. c. 31. s. 5. enacts to the same effect in general words, " That if any person or persons shall receive " or buy *any* goods or chattels that shall be feloniously taken " or stolen from *any other* person knowing the same to be " stolen; or shall receive, harbour, or conceal *any* burglars, " felons, or thieves, knowing them to be so; he or they shall " be taken as accessary or accessaries to the said felony or " felonies; and being legally convicted by the testimony of " one or more credible witnesses, shall suffer death as a felon " convict." But though the enacting words are thus general, yet not only the title (1) and other previous provisions of the act, but also the recital to the clause in question are all confined to the offences of burglary and housebreaking; and yet the subsequent clause, which has words of reference to this clause, seems always to have been taken generally.

Post. s. 142.

Transportation. 4 G. 1. c. 11. s. 1. *Vi.* 1 East's Rep. 309.

And by stat. 4 G. 1. c. 11. " Persons convicted of receiving " or buying stolen goods knowing them to be stolen may " be transported for 14 years." But they must pray the benefit of the statute (*a*). And the felony must be such as admits of accessaries at law (*b*): for if the principal be convicted of petit larceny only, the receiver of the goods is not punishable as an accessary, though the words of the statute be general; as was holden in Evans's case by all the Judges. But this has been since supplied by the stat. 22 Geo. 3. c. 58. aftermentioned, with certain exceptions.

(*a*) By all the Judges, Serjt. Forster's MS.

(*b*) 2 MS. Sum. 399. Rex v. Evans, O. B. 1749, Fost. 73.

22 Geo. 3. c. 58. Post. s. 142.

§ 142. Fost. 373. MS. Tracy, 126. 1 Hale, 619. 2. MS. Sum. 399.

Before these acts the receiving of stolen goods was merely a misdemeanor; but now the misdemeanor is merged in felony; and therefore a prosecution for a misdemeanor only would be illegal and improper. This however is to be understood of those cases only where the principal can be come at, so as to give an opportunity of convicting the receiver as an accessary to the felony. For till the stat. 1 Ann. the receiver could not be prosecuted or punished at all before the principal thief was tried and convicted. On this account the receiver, who is generally the employer and patron of the

(1) The title is " an act for the encouraging the discovery and appre- " hending of *housebreakers*."

thief,

thief, very often escaped with impunity; for if he could keep the thief out of the way, he the receiver could not be tried, and therefore went unpunished. To remedy this inconvenience the stat. 1 Ann. st. 2. c. 9. s. 2. enacts, "that "it shall and may be lawful to prosecute and punish every "such person and persons buying or receiving any stolen "goods, knowing the same to be stolen, as for a misde- "meanor; to be punished by fine and imprisonment; "though the principal felon be not before convicted of the "said felony; which shall exempt the offender from being "punished as accessary, if the principal shall be afterwards "convicted."

Ch. XVI. § 142. *Trial and punishment.*

1 Ann. st. 2. c. 9. s. 2. *Receiver punishable as for a misdemeanor.*

And by stat. 5 Ann. c. 31. s. 6. (immediately following the clause before set forth) it is provided, "that if any such "principal felon cannot be taken, so as to be prosecuted and "convicted for any such offence, yet nevertheless it shall "and may be lawful to prosecute and punish every such "person and persons buying or receiving any goods stolen "by any such principal felon, knowing the same to be "stolen, as for a misdemeanor, to be punished by fine and "imprisonment, or other such corporal punishment as the "court shall think fit; although the principal felon be not "before convicted of the said felony: which shall exempt "the offender from being punished as accessary, if such prin- "cipal felon shall be afterwards taken and convicted."

5 Ann. c. 31. s. 6. *Vide* ante, 744.

Upon a conviction under the lastmentioned clauses of the statutes of Ann. as for a misdemeanor, the punishment is by imprisonment, or at the discretion of the Judge, as in cases of misdemeanor.

2 MS. Sum. 400. Tipping's case, B. K. E. 11 G. 3.

But the stat. 4 Geo. 1. c. 11. which subjects receivers to transportation for 14 years, does not extend to prosecutions under the statutes of Anne for a misdemeanor only. And where the principal is amenable to justice, the receiver ought still to be prosecuted as an accessary to the felony, and not for a misdemeanor only (*a*).

By all the Judges, 2 MS. Sum. 399. Fost. 373.

(*a*) There is a case of Rex v. Pollard and Taylor, M. 11 G. 1. 2 Ld. Ray. 1370. which seems to say, that the prosecutor has an option to prosecute the receiver for a misdemeanor or for a felony, whether the principal can be taken or not. But this is denied by Mr. Justice Foster (p. 374.) to be law to that extent. *Vide* the S. C. post. 164.

Ch. XVI. § 142. *Trial and punishment.*

Jonathan Wild was indicted for a misdemeanor in receiving stolen goods, knowing, &c. But it appearing that the principal felons had been convicted and executed, it was objected that this indictment would not lie, being only given by the stat. 5 Ann. where the principal felon cannot be taken and convicted. And Pratt C. J. being of that opinion, the Defendant was acquitted.

Jonathan Wild's case, O. B. Sess. bef. East. Term, 5 G. 1. Serjt. Forster's MS. & Select Cas. of Evid. 57.

William Wilkes was convicted on the stat. 3 W. & M. c. 9. s. 4. and 5 Ann. c. 31. s. 6. for receiving stolen goods, as for a misdemeanor: but judgment was respited on a doubt, which was referred to the Judges. For it appeared that Innis, the prosecutor, had been in company with a person in London a few months before, who confessed himself to be the principal felon, and whom he then had an opportunity of taking into custody, but had neglected so to do; because the other had promised to go down to Warwick to give evidence against the receiver: and no opportunity of taking him had since occurred: for though the prosecutor had met the principal again by appointment, yet then he was rescued by some of his companions; and though the prisoner applied immediately for a warrant to retake him, yet he could not afterwards be met with; nor was he in fact taken at the time of finding the indictment. In Trinity term 1774, seven of the Judges against four were of opinion that there ought to be judgment on the conviction. The four thought that where a prosecutor had it once in his power to take the principal, and neglected it, it took the case out of the stat. of Q. Ann. But the seven held that the word *cannot* in the statute must be applied to the time of the prosecution for the misdemeanor, if the principal be then without collusion out of custody, which was the case here. For though the prosecutor had acted weakly and negligently at first, yet when he had the principal a second time in his power, he was rescued by force; and all due diligence was afterwards used to apprehend him.

Wilkes's case, Warwick Lent Ass. 1774, MS. Gould J. MS. Crown Cas. Res. Serjt. Forster's MS. (S. C. 1 Leach, 121.)

Receiver may be indicted for misdemeanor, though prosecutor might once have secured the principal, but neglected to do so.

But now by the stat. 22 G. 3. c. 58. it is enacted, "that "in all cases whatsoever, where any goods or chattels (except lead, iron, copper, brass, bell-metal, and solder,) "(the receiving of which is provided for by stat. 29 Geo. 2. "c. 30. after mentioned,) shall have been feloniously taken "or

22 G. 3. c. 58. s. 1. *Vide* post. 749. and Stott's case, post.

Receiver may be prosecuted for a misdemeanor whether principal be amenable to justice or not.

" or stolen; whether the offence of the principal shall Ch. XVI. § 142.
" amount to grand larceny or some greater offence, or to *Trial and punishment.*
" petit larceny only; (except where the person or persons
" actually committing the felony shall have been already
" convicted of grand larceny or of some greater offence;)
" every person who shall buy or receive any such goods and
" chattels, knowing the same to have been so taken or
" stolen, shall be deemed guilty of and may be prosecuted
" for a misdemeanor, and shall be punished by fine, im- *Punishable by fine, imprisonment, or whipping.*
" prisonment, or whipping, as the court of Quarter Ses-
" sions, who are hereby empowered to try such offender,
" or as any other court before whom he, &c. shall be tried
" shall think fit; although the principal felon or felons be
" not before convicted of the said felony; and whether he,
" she, or they is or are amenable to justice or not. And in
" cases where the felony actually committed shall amount to
" grand larceny or to some greater offence, and where the
" person or persons actually committing such felony shall
" not be before convicted, such offender or offenders shall
" be exempted from being punished as accessary or acces-
" saries if such principal felon or felons shall be afterwards
" convicted."

By s. 2. of the same act, " one justice of the peace on *Power to search for stolen goods.*
" complaint made before him on oath, that there is reason
" to suspect that stolen goods are knowingly concealed in
" any dwelling-house, out-house, garden, yard, croft, or
" other place or places, may by warrant under his hand and
" seal cause every such dwelling-house, &c. to be searched
" in the day-time: and the person or persons knowingly
" concealing the said stolen goods or any part thereof, or
" in whose custody the same or any part thereof shall be
" found, he, she, or they being privy thereto, shall be
" deemed guilty of a misdemeanor, (and may be brought
" before a justice of peace, and made amenable to answer
" the same by warrant), and being thereupon convicted by
" due course of law shall be punished in the manner afore-
" said." This not to repeal any former law for the punishment of such offenders.

As

Ch. XVI. § 143. *What goods, &c. within the acts.*

§ 143. As to what shall be considered as "goods and chattels" within these statutes of W. & M. and Ann., it has been holden (*a*) that they include sheep, and by the same reasoning fowls and other animals. And thus the receivers of stolen horses have been brought within these acts, who are not included in the stat. 31 Eliz. c. 12. s. 5. which ousts clergy as well from the accessaries after as before the fact, for the reason before given (*b*). But it has been often determined, and seems now to be settled, that receivers of *money* (*c*) stolen are not within the statutes: For which, this reason may be assigned, that though "*goods and chattels*" may in a large sense take in *money;* yet the intent of these acts only extended to the receipt of such kind of goods and chattels, the property in which, being generally and in its nature capable of being ascertained by outward marks and circumstances, made it more difficult for the thief to dispose of them without the aid of the receiver, by whom he was thus encouraged and protected: whereas money has not in general any such distinguishing marks, and it requires no aid from a receiver to give effect to the theft. And if every receiver of money which happened to have been stolen were liable to be called to account for it, it might be attended with serious inconvenience to the public in their general dealings; it being always difficult, and sometimes impossible, to account for the possession of each individual coin which passes in circulation. In analogy to this a majority of the Judges, in 1787, ruled that *bank notes*, &c. were not within the statutes against such receivers. That was the case of Sadi and Wm. Morris. The indictment charged that Sadi alias George Horn in the dwelling-house of S. S. feloniously stole, &c. one promissory note called a bank note, value 290*l.* marked, &c. and another note, &c. (of the same sort), the property of the said S. S. against the form of the statute, and that Wm. Morris the aforesaid promissory notes called Bank notes, &c. the same *being the property and chattels* of the said S. S. feloniously received and had, knowing them to be stolen, &c. After conviction it was moved in arrest of judgment on behalf of Morris, that the indictment was defective in charging the notes to be *chattels;* and further that the receiving

(*a*) 2 MS. Sum. 393. cites R. v. Tipping, B. R. East. 11 G. 3. and R. v. Nott, Gloucester Sp. Ass. 1779. and R. v. Morris, O. B. July 1779, cor. Nares and Buller Js.

(*b*) Ante, 616.

(*c*) Serjt. Forster's MS. and infra; and Ann Guy's case, O. B. 1782, 1 Leach, 276. So R. v. Davidson, Carlisle, 1766, cor. Bathurst J. 3 Burn's Just. tit. *Larceny*, s. 8. *Vide* ante, 643. same construction on st. 10 & 11 W. 3. c. 23.

R. v. Sadi and Morris, O. B. July 1787, MS. Buller J. MS. Jud. *Vide* S. C. ante, s. 37. (S. C. 2 Leach, 525.)

ceiving such notes was not within any of the before-mentioned statutes. These objections were argued by counsel before ten of the Judges, assembled at Serjeant's Inn, in Michaelmas term 1787, when seven of them were of opinion that the conviction was bad, on the ground that the receiving bank notes knowing them to be stolen was not within the statute of William, which they thought attached only on the receivers of property which came under the denomination of *goods and chattels* at the time when the act passed: and one of the seven thought that such would have been the construction if the stat. 2 G. 2. had preceded that of King William. But two of the Judges were strongly of a different opinion, to which the other also inclined; considering it as a consequence of law, that where a new felony was created by statute, it drew after it all the incidents of felony at common law, and therefore included accessaries before and after. They thought that the st. 2 G. 2. c. 25. s. 3. having made it felony to steal bank notes in like manner as if the party had stolen goods of the like value, the receivers of such property stood in the like predicament as the receivers of other goods and chattels. And the opinion of the majority in the above-mentioned case seems to have been much shaken by the resolution of all the Judges in Dean's case and other cases which have been before mentioned, wherein bank notes by the operation of the stat. 2 G. 2. were holden to be within the stat. 12 Ann. c. 7. against stealing money, goods, &c. to the value of 40*s.* out of the dwelling-house.

Ch. XVI. § 143.
Of what goods and chattels.
(Absent Lord Mansfield, and Ld. C. B. Eyre.)
Ante, 743.
(Gould and Ashhurst J.)
(Ld. Loughborough.)
Dean's case, 1795. Ante, s. 88. and Sess. Pap. for May 1796, p. 615.

§ 144.
Lead, iron, brass, copper, bell-metal, solder.
29 G. 2. c. 30. s. 1. Ante, 746.

The Legislature have also made particular provisions in a variety of cases against receivers of certain stolen goods. It was before remarked that certain articles were excepted out of the general statute of the 22 G. 3. c. 58.: these were before specially provided for by the st. 29 G. 2. c. 30. s. 1. which reciting that "whereas the practice of stealing lead, iron, cop- "per, brass, bell-metal, and solder, fixed to, or lying or be- "ing in or upon houses, out-houses, mills, warehouses, work- "shops, and other buildings, areas, yards, vaults, gardens, "orchards, or other places; and also the stealing of such "materials from ships, barges, lighters, boats, and other "vessels and craft, upon navigable rivers, in ports of entry "or discharge, creeks and docks belonging thereto, and also "from

Ch. XVI. § 144. *Lead, iron, brass, copper, bell-metal, solder.*

" from off wharfs, quays, and other places, is become a " great and notorious evil, by reason of the difficulty in ap- " prehending and convicting the thieves, and the still greater " difficulty of discovering and convicting the buyers or re- " ceivers thereof; which buyers or receivers are the princi- " pal cause of the commission of such thefts; and in regard " that the said offences are committed in such close and " clandestine manner that there can be no witness to the " same, but such who is or are partakers of the offence: and " whereas if the buyers and receivers of lead, iron, copper, " brass, bell-metal, or solder, knowing or having reasonable " cause to suspect the same to be stolen or unlawfully come " by, were made original offenders, and punishable indepen- " dent of the apprehension and conviction of the thief; and " if the apprehending, prosecuting, and convicting the of- " fenders in both kinds were rendered more easy and spee- " dy, it might more effectually tend to the discovery and " suppression of the said offences:" For remedy whereof enacts, " That from and after the 1st of October 1756, every " person who shall buy or receive any lead, iron, copper, " brass, bell-metal, or solder, knowing the same to be un- " lawfully come by; or shall privately buy or receive any " stolen lead, iron, copper, brass, bell-metal, or solder, by " suffering any door, window, or shutter to be left open or " unfastened between sun-setting and sun-rising for that pur- " pose; or shall buy or receive the same, or any of them, at " any time, in any clandestine manner from any person or " persons whatsoever; shall, being thereof convicted by due " course of law, although the principal felon or felons has " not or have not been convicted of stealing the same, be " transported for 14 years to any of his majesty's colonies " or plantations in America according to the laws in force " for the transportation of felons."

By s. 11. This shall not extend to repeal any former law then in being for the punishment of such offenders: but no offender punished by this act shall be afterwards liable to be punished by any such former law.

Though the first-mentioned clause inflicts so severe a punishment, and the act itself is framed in such a manner

as

as to beget a doubt whether the legislature did not consider the receiver as a felon, yet it is not so enacted in terms. It speaks indeed of the *principal felon;* and the offender is directed to be transported according to the laws in force for the transportation of *felons*, on conviction by due course of law; and in the subsequent clauses other minor offences of the same description are specifically declared to be *misdemeanors;* and by a subsequent clause all such misdemeanors are subjected to a summary jurisdiction, and punishable by forfeitures and corporal punishment; and the same construction seems to be implied in the act of the 21 G. 3. after mentioned: yet I believe the practice has been to indict upon the stat. 29 G. 2. as for a misdemeanor (*a*); that is, I presume where the principal has not been before convicted of felony: for by the general act of 3 W. 3. c. 9. before mentioned, receivers in general are made accessaries after the fact to the felony; and by stat. 4 G. 1. c. 11. they may be transported for 14 years. But the stat. 29 G. 2. c. 30. s. 1. is more comprehensive in the description of the offenders than the general acts against receivers. In the case of lead, iron, &c. affixed to buildings and stolen therefrom, the receiver is by the stat. 4 G. 2. c. 32. and 21 G. 3. c. 26. before mentioned, made liable to the same punishment as if he had stolen the goods; which is transportation for 7 years, or imprisonment and whipping.

Ch. XVI. § 144. *Lead, iron, pewter, &c.*

Vide R. v. Wyer, post. s. 145.

Vide Exception in stat. 22 G. 3. c. 58. ante, 747. and Wild's case, ante, 746. Ante, 743.

Ante, s. 30.

By the stat. 21 G. 3. c. 69. entitled an act to *explain and amend* the stat. 29 G. 2. reciting that act, and that it had been found by experience to prevent many felonies being committed in respect to the several articles mentioned therein, but that the metal called *pewter* not being included, evil disposed persons had taken advantage thereof, and the stealing of *pewter pots* and *other pewter*, and the buying and receiving the same, knowing the same to be stolen, was become a great evil; enacts, "That after the 1st of *August* "1781, every person who shall buy or receive any *pewter-* "*pot or other vessel*, or *any pewter*, in any form or shape "whatever, knowing the same to be stolen or unlawfully "come by; or shall privately buy or receive any stolen pew- "ter by suffering any door, window, or shutter to be left open

21 G. 3. c. 69. *Pewter.*

(*a*) So it appeared on inquiry in R. v. Stott: *vide* post.

"or

Ch. XVI. § 144. *Lead, iron, &c.*

" or unfastened between sun-setting and sun-rising for that " purpose; or shall buy or receive the same at any time in " any clandestine manner from any person or persons what- " soever; shall, being thereof convicted by due course of " law, although the *principal felon or felons* has not or have " not been convicted of *stealing* the same, be transported in " like manner as *other felons* are directed to be transported by " law for any time not exceeding seven years, or be kept " and detained in prison and therein kept to hard labour for " any time not exceeding three years nor less than one year; " and within that time (if such court think fit) such offender " and offenders shall be once or oftener but not more than " three times publicly whipped."

Vide ante, and R. v. Wyer, post. s. 145.

29 G. 2. c. 30. s. 1. *Not confined to raw materials.*

It has been considered by some, that the act of the 29 Geo. 2. c. 30. relates to the metals therein mentioned only in their common or raw state, as contradistinguished from wrought goods: and upon the argument of the case of Rex v. Stott in Hil. 39 Geo. 3. B. R. a case of Rex v. Scott was cited to that effect, as having been so ruled by the late Mr. Serjt. Adair, Ch. J. of Chester; in which he said that the same construction had been put upon the statute during his experience at the Old Bailey while Recorder of London. But there is great difficulty in adopting such a construction; for the statute speaks of lead, iron, &c. *fixed to houses*, which cannot be in their raw state; but the metals must in some respect be manufactured, and be either bars, bolts, rails, sheets of lead, or in some other form capable of a more specific description than merely lead, iron, or copper. That this statute was not intended to be so confined seems evident from the preamble of the stat. 21 Geo. 3. c. 69. before set forth, from whence it must be collected that the Legislature considered that if *pewter* generally had been mentioned in the former law, it would have reached the case of receiving pewter pots after they were stolen; and that *pewter* was a sufficient description of every thing manufactured out of it, and that the form or shape did not make that description less proper. Besides, it is difficult to conceive that the stat. 29 Geo. 2. should recite that the practice of stealing iron, &c. had become a great and notorious evil, if it meant only to prevent the stealing such pieces of iron, &c. to which no appropriate name or description could be given.

MS. Post. Scott's case. Chester Sp. Ass. 1798.

The

Ch. XVI. § 144.
Lead, iron, pewter, &c.

The case of Rex v. Stott above mentioned was an indictment for a misdemeanor (removed by writ of error from the Quarter Sessions) for receiving stolen iron knowing it to be stolen, which was laid in the indictment as so many "pieces of iron called strokes," so many "pieces of iron," and so many "pieces of iron called horse-shoes," of a value under 1*s.* on which judgment of imprisonment for a year had been given by the court below after conviction. The Court of B. R. gave no direct opinion on the subject; but intimated great doubt, Whether, as the general act of the 22 G. 3. c. 58. expressly excepted *iron*, any other judgment could be passed than that of transportation directed by the stat. 29 G. 3. c. 30.? on which doubt the prisoner's counsel waived any further prosecution of the writ of error.

Rex v. Stott, Hil. 39 Geo. 3. B. R. MS.

§ 145.
Receivers of goods stolen on the Thames.
2 G. 3. c. 28. s. 12.
Vide post. tit. *Malicious Mischief—Cutting Cordage, &c. with intent to steal.*

By st. 2 G. 3. c. 28. "Every person who shall buy or receive "any part of the cargo or loading of, or any goods, stores, "or things of or belonging to any ship or vessel in the river "Thames, knowing the same to be stolen or unlawfully "come by; or shall privately buy or receive any such goods "stores, or things, or any part of such cargo or loading, by "suffering any door, window, or shutter to be left open or "unfastened between sun-setting and sun-rising for that pur-"pose; or shall buy or receive the same or any of them at "any time in any clandestine manner from any person or "persons whomsoever, shall, being thereof convicted by due "course of law, although the principal felon or felons, "offender or offenders, has or have not been convicted of "stealing or unlawfully procuring the same, be transported "for 14 years," &c.

Vide st. 39 & 40 Geo. 3. c. 87. for preventing depredations on the River, s. 16. & 21.

R. v. Wyer, 2 Term Rep. 77.

The offence of receiving under this act has been deemed felony, though the statute do not declare so expressly in this clause. For by the stat. 3 & 4 W. & M. c. 9. s. 4. receivers of stolen goods may be prosecuted as felons: and though by stat. 1 Ann. st. 2. c. 9. s. 2. they may be punished as for a misdemeanor where the principal felon is not convicted; yet s. 14. of the 2 G. 3. seems to consider them as felons; for thereby any person stealing or unlawfully receiving such stolen goods knowingly shall, on discovering two other offenders, be entitled to a pardon for all *such felonies*. In truth the statute seems only to have made the receiving of the goods under

Ch. XVI. § 145. *Receivers on the Thames.*

such circumstances evidence of their having been received by the party, knowing them to have been stolen.

39 & 40 G. 3. c. 87. s. 22. *Such receivers shall plead instanter.*

However the legislature seem to have considered it only as a misdemeanor by the st. 39 & 40 G. 3. c. 87. s. 22. which, reciting that "whereas by the st. 2 G. 3. c. 28. persons guilty "of certain offences are punishable by transportation for 14 "years, but the said offences not being by the said act de- "clared to be felony, the trial thereof may in all cases be "put off by means of a traverse to the next Sessions after "the finding of the bill of indictment for the same, and the "offender be in the mean time bailed (*a*), whereby justice "has been in many instances eluded;" for remedy thereof enacts, "that from the passing of the act whenever any in- "dictment shall be found against any person for any of the "said offences, the person so indicted shall plead to the said "indictment without having time to traverse the same, as is "usual in cases of misdemeanors."

§ 146. *Receivers of jewels, plate, &c.* 10 G. 3. c. 48.

By stat. 10 G. 3. c. 48. "Every person who shall buy or "receive any stolen jewel or jewels, or any stolen gold or "silver plate, watch, or watches, knowing the same to have "been stolen, shall, in all cases where such jewel or jewels, "or gold or silver plate, shall have been feloniously stolen, "accompanied with a burglary actually committed in the "stealing the same, or shall have been feloniously taken by "a robbery on the highway, be triable as well before con- "viction of the principal felon in such felony and burglary, "or robbery, whether he shall be in or out of custody, as "after his conviction. And if any person so buying or re- "ceiving such jewel or jewels, or gold or silver plate, shall "be convicted thereof, he shall be adjudged guilty of felony, "and transported for 14 years," &c.

R. v. E. Moses, Kent Sum. Ass. 1783, cor. Gould J. MS. Gould and Buller J. MS. Crown Cas. Res. and MS. Jud. *A cornelian seal is a jewel within the act.*

Under this statute Esther Moses was indicted at the Kent Summer Assizes 1783, before Gould J. The indictment set forth a robbery of Mr. Drummond in the highway of a watch, gold watch-case, a red cornelian seal set in gold, and a white one, also set in gold; and then charged that the prisoner received the stolen watch, jewels, and gold plate above mentioned, knowingly, against the form of the statute. The

(*a*) In R. v. Wyer (ante) the Court refused to bail the prisoner, on the supposition that the offence was felony.

words

words "*watch or watches*" are omitted in the latter part of the statute, which makes the felony. And the prisoner being convicted, judgment was respited to take the opinion of the Judges, Whether the receiving a gold watch and such seals, knowing them to have been stolen, (being taken by robbery in the highway,) were a felony within the act? This was first debated by all the Judges in Mich. term 1783, and adjourned for further consideration to Hil. term succeeding; when ten Judges present (and one absent and concurring) held the prisoner well convicted. Some thought the gold in the watch might be deemed *plate;* but others thought that was not the meaning of the statute: but all held that the *seals* set in gold came under the word *jewels.*

Ch. XVI. § 146. *Jewels, plate, watches, &c.*

§ 147. *Receivers of other goods before specified.*

Also the receiving of other stolen goods knowingly has been before noticed, in treating of several particular descriptions of property, the stealing of which has been prohibited under special penalties; amongst these may be reckoned the receiving of stolen woollen, linen, and cotton goods, and garden plants, &c. So by stat. 25 G. 2. c. 10. every person who shall buy or receive any wad or black cawke, otherwise black lead, so unlawfully taken and carried as is therein before mentioned, shall be deemed guilty of felony, and on conviction be subject to all the pains and penalties which persons can or may by the laws and statutes of the realm be subject to for buying or receiving stolen goods or chattels knowingly.

Ante, s. 28, &c.

Black lead. Ante, s. 32.

§ 148. *Naval and military stores of the King.*

Having before touched upon the offence of stealing naval and military stores, it remains now to consider how the law stands with regard to receivers of such stores.

By the stat. 9 and 10 W. 3. c. 41. reciting, "that notwithstanding the laws made for preventing the stealing "and embezzling of the King's stores of war and naval "stores, those frauds, thefts, and embezzlements are frequently practised, and the convicting of such offenders is "rendered difficult and impracticable, by reason it rarely "happens that direct proof can be made of such offenders "immediate taking, embezzling, or carrying away any of his "majesty's said stores, &c. out of his storehouses, docks, "ships,

9 & 10 W. 3. c. 41. made a public act by st. 1 G. 1. st. 2. c. 25. s. 14. Ante, s. 53.

Ch. XVI. § 148. *King's stores, &c.*

" ships, &c. or other places for keeping and preserving the " same, but only that such goods are marked with the King's " mark, and found in the custody and possession of the per- " son accused, &c.; for preventing such embezzlements for " the future, and for the more effectual execution of the laws " already in force against such embezzlements and thefts," it is enacted, " that it shall not be lawful for any person or per- " sons whatsoever, other than persons authorized by contract- " ing with the King's principal officers or commissioners of " the navy, ordnance, or victualling-office, for his majesty's " use, to make any stores of war or naval stores whatsoever " with the marks usually used to and marked upon his ma- " jesty's said warlike and naval or ordnance stores; viz. any " cordage of three inches and upwards, wrought with a white " thread laid the contrary way; or any smaller cordage, viz. " from three inches downwards, with a twine in lieu of a " white thread, laid to the contrary way as aforesaid; or any " canvas wrought or unwrought, with a blue streak in the " middle; or any other stores with the broad arrow, by " stamp, brand, or otherwise; upon pain that every such " person or persons who shall make such goods so marked " as aforesaid, not being a contractor with his majesty's prin- " cipal officers or commissioners of the navy, ordnance, or " victuallers, for his majesty's use, or employed by such " contractor for that purpose as aforesaid, shall for every " such offence forfeit such goods, and 200*l.* with costs of " suit, one moiety to the King, the other to the informer, to " be recovered by action of debt," &c.

No warlike or naval stores, except for the king's use, shall be made with the king's marks.

By s. 2. " Such person or persons in whose custody, pos- " session, or keeping such goods or stores marked as afore- " said shall be found, not being employed as aforesaid; and " such person or persons who shall conceal such goods or " stores marked as aforesaid, being indicted and convicted " of such concealment, or of the having such goods found " in his custody, possession, or keeping, shall forfeit such " goods and 200*l.*, together with the costs of prosecution; " one moiety to the King, and the other to the informer, to " be recovered as aforesaid, and shall also suffer imprison- " ment till payment and performance of the said forfeiture; " unless such person shall upon his trial produce a certificate " under

Persons in whose custody such marked stores are found, and who shall conceal the same, shall forfeit such goods and 200*l.* *and be imprisoned till payment.* *Vide* post. 9 G. 1. c. 8. s. 3. and *vide* s. 149. Cole's case.

" under the hand of three or more of the King's officers or " commissioners of the navy, ordnance, or victuallers, ex- " pressing the numbers, quantities, or weights of such goods " as he or she shall then be indicted for, and the occasion " and reason of such goods coming to their hands or pos- " session."

Ch. XVI. § 148. *King's stores, &c.*

In addition to which, by the stat. 9 Geo. 1. c. 8. s. 3. " Every person lawfully convicted of having in their custody " any timber, thick stuff, or plank, marked with the broad " arrow, by stamp, brand, or otherwise, or of concealing " any timber, &c. so marked, shall suffer, forfeit, and pay " as for having, keeping, or concealing any other warlike, " naval, or ordnance stores, contrary to the said act" of King William.

Extended to timber, &c. by 2 G. 1. c. 8.

By s. 4. of the st. 9 & 10 W. 3. the commissioners, &c. may sell and dispose of any of the said stores so marked, &c. as theretofore, and the buyers may keep and enjoy the same without incurring the penalty of this or any other law, on producing a certificate or certificates under the hand and seal of three or more of the said principal officers or commissioners, &c. that they bought such goods from them, or from such person or persons as bought the said stores from the said officers, &c. at any time before such stores were found in their custody: " in which certificate or certificates the quantities of such " stores shall be expressed, and the time when and where " bought of the said commissioners; who, or any three or " more of them, are directed to give to such person or per- " sons who desire the same, and have bought or shall here- " after buy any of the said stores, within 30 days after the " sale and delivery of the said stores so sold, or to be sold " as aforesaid."

9 & 10 W. 3. c. 41. s. 4. *Commissioners may sell such stores with certificates.*

Sect. 8. provides that the King's stores may be lent by the said officers or commissioners of the navy, or any chief commander of any of the King's ships at sea, to any merchant ship in distress or otherwise, as before the act, in case such goods be restored with all possible conveniency, and the persons so borrowing have such certificates as aforesaid, which such officers, &c. are empowered to grant.

Or lend them to ships in distress.

By

Ch. XVI. § 148. *King's stores, &c.*

1 Geo. 1. st. 2. c. 25. made perpetual by 9 G. 1. c. 8. s. 3.

Summary jurisdiction to inquire and punish for small embezzlements, &c.

By stat. 1 Geo. 1. st. 2. c. 25. s. 3. "The said principal officers and commissioners of the navy, or any one or more, shall have power to inquire, and by warrant under hand and seal to empower any person to search for the same in all places, in like manner as justices of peace may do in case of felony, and punish the offenders by such fine and imprisonment as aforesaid, (*i. e.* (by s. 1.) such fine not exceeding 20*s.*, and imprisonment not exceeding a week, either in the next gaol, or in the custody of the messengers attendant on them; and they may also discharge the party from such fine and imprisonment; and on non-payment of the fine so imposed and not remitted, may imprison the offender till payment, or otherwise cause him to be sent to the house of correction next to the place where the offence was committed, there to be kept to hard labour for two months; which fine is to be paid to the clerk of the chest at Chatham;) the value of the goods so embezzled or filched away not exceeding 20*s.* and cause the goods to be brought in again: and if the offence require a severer punishment, then they, any one or more of them, may commit such offender to the next gaol, or to the custody of their messenger aforesaid, till he enter into recognizance with surety or sureties, according to the nature of the offence, to appear and answer to the same in the court of Exchequer or other court where the King shall question him for the same within a year following, on process duly served for that purpose on such offender."

By s. 4. a summary jurisdiction is given to certain officers to inquire of and punish embezzlements of such stores under the value of 20*s.*

9 G. 1. c. 8. *Jurisdiction to mitigate penalty and commit to gaol, &c.*

The stat. 9 Geo. 1. c. 8. s. 4. (referring to the offences described in the 2d sect. of the stat. 9 & 10 W. 3. c. 41. and the additional provision made by the 3d sect. of the said act 9 Geo. 1. c. 8.) provides, "That it shall and may be lawful for any judge, justice, &c. before whom any offender shall be convicted of any of the offences before recited, enacted, or mentioned in this act, to mitigate the penalty for the same as they shall see cause, and to commit the offender so convicted to the common gaol of the county, &c. where the offence shall be committed until payment of the penalty and forfeiture imposed by this or the said

"former

"former act, or mitigated as aforesaid; or to punish such of- Ch. XVI. § 148.
"fender corporally, by causing him to be publickly whipped *King's stores, &c.*
"or committed to some public workhouse, there to be kept
"to hard labour for six months, or a less time, in the dis-
"cretion of such judge," &c. And by s. 5. "Where any *Dispute as to title to penalties.*
"dispute shall arise between the persons on whose informa-
"tions or oaths any offender or offenders against this or the
"former act shall be prosecuted and convicted, touching any
"right or title to any of the forfeitures or penalties before
"mentioned, or any part thereof, the judge, justice, or justices
"before whom such offender or offenders shall be convicted
"shall examine the matter, and finally determine the same."

Then the statute 17 Geo. 2. c. 40. s. 10. reciting the act of 17 G. 2. c. 40. s. 10.
the 9 & 10 W. 3. c. 41. against the making, &c. stores with the King's marks, and the having such stores so marked, or concealing the same, or the additional stores mentioned in the 3d sect. of the stat. 9 Geo. 1. c. 8. and reciting also the last-mentioned clauses (s. 4 & 5.) of the same act; and that "whereas some doubts had arisen touching the method of "trial and punishment of offenders against the said recited "acts, whether they might be indicted and tried for the of-"fences in the said acts mentioned, and whether any judge, "or justice of assize, or justices of peace at sessions might "hear, try, and determine the same, and on conviction set "such fine or mitigate the same, &c.; or whether such of-"fenders, in order for recovering the said forfeitures and "penalties inflicted by the said act could only be proceeded "against by action of debt, &c. in some court of record at "Westminster; by reason of which doubts offenders indict-"ed, &c. had escaped, &c.; for explaining the same, declares "and enacts, that it shall and may be lawful for any judge, *Judges at the assizes or justices of peace at quarter sessions may impose any fine not exceeding 200l. for any offence within the 9 & 10 W. 3. c. 41. and 9 G. 1. c. 8. and may mitigate, &c. or in lieu thereof inflict corporal punishment.*
"justice, or justices at the assizes, or justices of peace at the
"general quarter sessions, &c. to hear, try, and determine by
"indictment or otherwise *all or any* the crimes or offences
"mentioned in the said recited acts, and that the judge, &c.
"before whom such offenders shall be indicted or tried and con-
"victed of all or any the offences in the said recited act men-
"tioned, may impose any fine not exceeding 200*l.* on such
"offender or offenders, one moiety to the King, and the other
"to the informer; and may mitigate the said penalty and for-
"feitures inflicted by the said recited acts, or either of them;

"and

Ch. XVI. § 148. *King's stores, &c.*

" and to commit the offenders so convicted and fined to the " common gaol of the county or place where the offence " was committed until payment thereof, &c.; or in lieu " thereof, to punish such offenders in the premises corpo- " rally, by causing them to be publicly whipped, and com- " mitted to some house of correction or public workhouse, " there to be kept to hard labour for three months, or less " time, in the discretion of such judge," &c.

Bland's case, Mich. 1793. B. R. 2 Leach, 678.

Under this clause it is holden, that the Court have authority to adjudge the offender to suffer corporal punishment, although he be ready and offer to pay the penalty of 200*l.*

§ 149. 39 & 40 Geo. 3. c. 89. intitled " An act for the " better pre- " venting the " embezzle- " ment of his " majesty's na- " val, ordnance, " and victualling " stores."

The stat. 39 & 40 Geo. 3. c. 89. s. 1. reciting the acts of the 22 Car. 2. c. 5. 9 & 10 W. 3. c. 41. 9 Geo. 1. c. 8. and 17 Geo. 2. c. 40. s. 10. and that " notwithstanding the " penalties and punishments inflicted by the said recited " acts, the stealers, embezzlers, and receivers of his majes- " ty's warlike and naval, ordnance, and victualling stores " had greatly increased, so that it had become necessary to " make some *further* and more effectual provision for pre- " venting their wicked practices in future;" enacts, " that " from and after the passing of the act (28th July 1800) " every person or persons, (such person or persons not being " a contractor or contractors, or employed as in the said " recited act of the 9 & 10 W. 3. is mentioned,) who shall " willingly or knowingly *sell or deliver*, or cause or procure " to be sold or delivered, to any person or persons whomso- " ever; or who shall willingly or knowingly *receive or have* " in his, her, or their custody, possession, or keeping, any " stores of war, or naval, ordnance, or victualling stores, " or any goods whatsoever marked as in the said re- " cited acts are expressed, or any canvas marked either " with a blue streak in the middle, or with a blue streak " in a serpentine form, or any bewper, otherwise called " buntin, wrought with one or more streaks of raised " tape; (the said stores of war, or naval, ordnance, or " victualling stores, or goods above mentioned, or any of " them being in a raw or unconverted state, or being new, " or not more than one-third worn); and such person or " persons who shall *conceal* such stores or goods, or any of " them, marked as aforesaid, shall be deemed *receivers of* " *stolen goods* knowing them to have been stolen, and shall " on.

Every person, (not a contractor, &c.) who shall knowingly, &c. sell or deliver, or receive or have in his possession any naval, ordnance, or victualling stores, &c. in a raw state, or new, or not more than one third worn, and such person who shall conceal the same, shall be deemed a receiver of stolen goods knowingly, and be transported for 14 years.

" on conviction be transported beyond the seas for the term " of fourteen years, in like manner as other receivers of " stolen goods are directed to be transported, &c. unless " such person or persons shall upon their trial produce a cer- " tificate under the hands of three or more of his majesty's " principal officers or commissioners of the navy, ordnance, or " victualling, expressing the numbers, quantities, or weights " of such stores or goods as they shall then be indicted for, " and the occasion or reason of such stores or goods com- " ing to their hands or possession."

Ch. XVI. § 149. *King's stores, &c.*

unless he produce a certificate from the commissioners, &c. accounting for such stores.

By s. 2. " Such person or persons, (not being a contractor " or contractors, or employed as aforesaid,) in whose cus- " tody, possession, or keeping any of the said stores called " canvas, marked with a blue streak in a serpentine form, " or bewper, otherwise buntin, wrought as above mentioned, " shall be found, (such canvas or bewper, &c. not being " charged to be new, or not more than one-third worn,) " and all and every person and persons, who shall be con- " victed of any offence contrary to so much of the said re- " cited act of the 9 & 10 W. 3. as relates to the making, or " the having in possession or concealing any of his majesty's " warlike, or naval, or ordnance stores, marked as therein " specified, shall, besides forfeiting such stores and 200*l.* " and costs as therein mentioned, be corporally punished by " pillory, whipping, and imprisonment, or by any or either " of the said ways and means, in such manner and for such " space of time as to the judge or justices before whom such " offender, &c. shall be convicted shall seem meet, &c. " Provided that such judge or justices may mitigate the " said penalty of 200*l.* as they shall see cause."

Persons in whose custody shall be found canvas or buntin marked, &c. (not being new, &c.) or who shall be convicted of any offence contrary to 9 & 10 W. 3. relating to warlike stores, &c. shall besides the forfeiture of 200l. (which may be mitigated) suffer corporal punishment.

" Provided (s. 3.) that nothing in this act, or in the said " recited act of the 9 & 10 W. 3. shall be deemed to ex- " tend to exempt from the operation of this or the said re- " cited act any person or persons being contractors, or " employed as in the said last-mentioned act is mentioned, " except only so far as concerns stores or goods, marked as " aforesaid, which shall be *bonâ fide* provided, made up, or " manufactured by such persons, or by their order, and " which shall not have been before delivered into his majes- " ty's store; unless, having been so delivered, they shall have

Not to exempt contractors, except as to stores bonâ fide *made up for his majesty, or returned to them.*

Ch. XVI. § 149. *King's stores, &c.*

" been sold or returned to such persons by the commissioners of his majesty's navy, ordnance, or victualling respectively."

§ 150. *Defacing marks on the King's stores, felony, and transportation for 14 years.*

Sect. 4. enacts, " That if any person or persons shall, from and after the passing of this act, (28th July 1800,) wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase, wholly or in part, any of the marks in the said act of the 9 & 10 W. 3. or in this act mentioned, or any other mark whatsoever denoting the property of his majesty, &c. in or to any warlike or naval, ordnance, or victualling stores; or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing his majesty's property in such stores; such person or persons shall be deemed guilty of felony, and shall, on conviction, be transported to parts beyond the seas for 14 years in like manner as other felons, &c."

§ 151. *Persons not transported for a first offence against this act, and guilty of a second offence against this or the stat. 9 & 10 W. 3. shall be transported for 14 years.*

By s. 5. " If any person or persons hereafter convicted of any offence contrary to this act, for which he shall not have been transported; or, contrary to the said recited act of the 9 & 10 W. 3., shall be guilty of a second offence, either contrary to that act or the present act, which would not otherwise, as the first offence, subject them to transportation, and shall be thereof legally convicted; such person or persons shall, by judgment of the court wherein they shall be so convicted, be transported for 14 years, in like manner as other offenders," &c.

Returning from transportation before term expired, death.

By s. 6. " Persons so transported, &c. returning into any part of Great Britain or Ireland before the expiration of the term, &c. shall suffer as felons, and have execution awarded against them, as persons attainted of felony, without benefit of clergy."

Court may commute transportation for corporal punishment and fine.

" Provided (s. 7.) that it shall and may be lawful for the court before whom any offender shall be indicted and convicted of all or any of the crimes or offences herein before mentioned to be punishable with transportation, to mitigate or commute such punishment, by causing the offender or offenders to be set on the pillory, publicly whipped, fined, or imprisoned, or by all or any one or more

" more of the said ways and means, as such court in its " discretion shall think fit; one moiety of which fine (if any " imposed) shall be to his majesty, &c. and the other moi- " ety to the informer; and also to order such offender or " offenders to be imprisoned until such fine be paid." Ch. XVI. § 151. *King's stores.*

§ 152. *Reward on discovery.*

By s. 8. persons discovering to the navy, ordnance, or victualling boards, or apprehending, or first informing against any offenders guilty of stealing or embezzling such stores, or of any of the offences mentioned in the said stat. 9 & 10 W. 3. or in the present act before mentioned, which shall not be prosecuted in the summary way after prescribed, shall on conviction receive, for every such offence so discovered, 20*l.* over and above any share of penalty or fine they may be entitled to as informers, so as the same do not amount to more than 20*l.*; or, (if amounting to more than 20*l.*,) shall fail to be paid by the offenders on whom inflicted for three calendar months after conviction, or if they be detained by sentence of imprisonment, for three calendar months next after the expiration of such sentence. And by s. 9. disputes respecting the title to such rewards shall be determined by any of the commissioners of the navy, &c. on oath before the same, or any justice of peace. By s. 10. the commissioners of the navy, &c. shall cause such reward to be paid by the treasurer of the navy or ordnance, on producing a certificate under the hand of the clerk of assize, or other proper officer of the court before whom such offenders shall be tried, certifying the conviction, and that the informer's share of any penalty or fine inflicted on such offender or offenders does not amount to more than 20*l.*; or if amounting to more, hath failed to be paid by such offender or offenders for three months after conviction, or if imprisoned by sentence for three months after the expiration of such imprisonment; for which certificate the said clerk, &c. shall charge no more than 5*s.*

Search warrants.

By s. 11. any commissioner of the navy, &c. or justice of peace may grant warrants to search houses, ships, &c. in the day-time, and in case any stores or goods marked as before mentioned shall on such search be found, to cause the same and the offenders to be brought before such commissioner or justice of peace to be bound over, &c.

The

Ch. XVI. §152. *King's stores*

The act then proceeds to create several misdemeanors; amongst others, the not accounting to the satisfaction of such commissioner or justice for the possession of such stores, &c. which misdemeanors are determinable in a summary manner before the same persons: and by s. 18. authority is given to any such principal officer or commissioner of the navy, &c. or justice of peace, &c. "to hear and determine any complaint against any person (not being a contractor or employed as aforesaid) for unlawfully selling or delivering, or causing or procuring to be sold or delivered, or for receiving or having in their custody, possession, or keeping, or for concealing, any stores of war, or naval, ordnance, or victualling stores or goods marked as aforesaid, of any value, in the whole not exceeding 20*s*." And on conviction (founded on complaint exhibited within three calendar months after the offence committed) they are empowered to inflict a fine on the offender, to be levied as therein mentioned; from which an appeal is given to the Quarter Sessions. And then,

Summary jurisdiction.

Not to prevent prosecutions against receivers, &c. so as the part, be not twice punished.

By s. 24. it is "enacted and declared, that nothing therein before contained, which gives to any commissioner or justice, &c. authority to hear and determine offences in a summary way, shall extend to prevent parties accused of selling or delivering, or of having in their custody, possession, or keeping, or of receiving or concealing, any of the stores marked as above mentioned, under the value of 20*s*. from being prosecuted as receivers of stolen goods under this act, or for unlawfully having the same in their custody, or concealing the same, under the said acts of the 9 & 10 W. 3. 9 Geo. 1. or 17 Geo. 2. in any court of record, oyer and terminer, or otherwise, as they might have been if no such authority had been given; or to take away from any person or court any power, &c. or authority which they had for the hearing and determining of such offences, in case no authority to hear and determine the same in a summary way had been given; so as that the same person shall not be punished twice for the same offence."

By the 29th sect. the provisions of the act are extended to Scotland.

The

The most general question which occurs upon this body of statutes is, What shall be said to be a receiving or having? or in other words, Who is liable to be indicted as a receiver within the meaning of the several provisions?

Ch. XVI. § 153. *What a receiving or having, &c.*

§ 153. *What a receiving or having in possession.* Ante, 743, 4. 746.

As to what general evidence shall be said to constitute a receiver under the statutes of William and Anne, and 22 Geo. 3. c. 58. it is to be observed, that the words of those acts are in the disjunctive, "receive *or* buy." Therefore it follows, that in order to constitute a receiver generally so called, it is not necessary that the goods should be actually purchased by him: neither does it seem necessary that the receiver should have any interest whatever in the goods: it is sufficient if they be in fact received into his possession in any manner *malo animo*, as to favour the thief; or without lawful authority express, or to be implied from circumstances; as in the case after mentioned, determined by Mr. Justice Foster on the Western circuit. This distinction is however to be noted, that in general cases under the statutes last mentioned the receiver is averred to have knowledge that the goods were stolen; which may be collected from circumstances; and by Lord Hale, the buying goods at an under value is presumptive evidence that the buyer knew they were stolen. But under the statutes for protecting the King's stores, the King's mark denotes the original ownership; and there the *onus probandi* lies on the party to account satisfactorily for his possession according to the regulations prescribed, otherwise the bare fact of possession concludes him. But even here the presumption of the *malus animus* arising from the bare fact of possession may be rebutted by circumstances, as in the following case:

Vide 1 Hale, 619, 620.

A widow woman was indicted before Mr. Justice Foster upon the Western circuit on the stat. 9 & 10 W. 3. c. 41. for having in her custody divers pieces of canvas marked with the King's mark in the manner described in the act; she not being a person employed by the commissioners of the navy to make the same for the King's use. The canvas was marked as charged in the indictment, and was clearly proved to be such as was made for the use of the navy, and to have been found in the Defendant's custody. The Defendant

Fost. Append. 439. edit. of 1792.

One became possessed on the death of her husband of canvas stores, which had been purchased by him in his lifetime at a public sale, and had been many years made up into household fur-

Ch. XVI. § 153. *What a receiving or having, &c.*

niture, but no evidence was given of any certificate of such sale being lawful as required by stat. 9 & 10 W. 3. or of any excuse allowed by the act; yet the possession being by act of law without fraud; held not within the penalty of the statute.

fendant did not attempt to shew that she was within any exception of the act, as being a person employed to make canvas for the use of the navy: nor did she offer to produce any certificate from any officer of the crown, touching the occasion and reason of such canvas coming into her possession. Her defence was, that when there happened to be in his majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons intrusted with the stores to make a public sale of them in lots, larger or smaller as best suited the purpose of the buyers; and that the canvas produced in evidence, which happened to have been made up long since, some for table-linen and some for sheeting, had been in common use in the Defendant's family a considerable time before her husband's death, and upon his death came to the Defendant, and had been used in the same public manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen. This sort of evidence was strongly opposed by the counsel for the crown, who insisted, that, as the act allows of but one excuse, the Defendant, unless she could avail herself of that, could not resort to any other. That if the canvas were really bought of the commissioners, or of persons acting under them, there ought to have been a certificate taken at the time of the purchase; and the second section admits of no other excuse. But the Judge was of opinion, that though the clause of the statute, which directs the sale of these things, had not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seemed to exclude any other excuse for those in whose custody they should be found: yet still the circumstances attending every case which might seem to fall within the act ought to be taken into consideration; otherwise a law calculated for wise purposes might by too rigid a construction of it be made a handle for oppression. There was no room to say, that this canvas came into the possession of the Defendant by any act of her own. It was brought into family use in the life-time of her husband, and it continued so to the time of his death; and by act of law it came to her. Things of that kind had been frequently exposed to public sale;

sale; and though the act pointed out an expedient for the indemnity of the buyers, yet probably few buyers, especially where small quantities had been purchased at one sale, had used the caution suggested to them by the act. And if the Defendant's husband really bought the linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time to punish her for his neglect. He therefore thought the evidence given by the Defendant proper to be left to the jury; and directed them, That if, upon the whole evidence, they were of opinion, that the Defendant came to the possession of the linen without any fraud or misbehaviour on her part, they should acquit her; and she was accordingly acquitted.

Ch. XVI. § 153. *What a receiving or having, &c.*

An indictment charged that Thomas Cole, on the 28th January 1801, unlawfully, willingly, and knowingly did *receive and have* in his custody, possession, and keeping certain naval stores of the King, being all marked with the broad arrow, he not being a contractor, &c. against the statute, &c. The jury found the prisoner guilty; but said they did not find that he *received* the stores after the 28th July 1800, but only that he had them in his possession after that day. Judgment was thereupon respited to take the opinion of the Judges; a majority of whom inclined to think, that the statute was to be construed in the disjunctive, and the word *or* (receive *or* have) not to be taken as *and:* but because of the disagreement of some, and that the case was not likely to occur again, the prisoner, on the finding of the jury, was recommended to mercy. It seemed however to be agreed that the case was not within the stat. 9 & 10 W. 3. c. 41. because the goods were not charged to have been found in the prisoner's possession.

Cole's case, Winchester, March 1801, cor. Le Blanc J. MS. Jud. *Difference between receiving and having in possession.*

Some cases have turned on the distinction between the cases of accomplice and receiver in general.

§ 154. *Difference between receiving and stealing.*

Dyer and Disting were indicted for stealing a quantity of barilla, the property of M. Hawker. The fact appeared to be, that the barilla was on board a Swedish ship at Plymouth consigned to Hawker. That Hawker employed Dyer, who was the master of a large boat, for the purpose of bring-

Rex v. Dyer and Disting, Exeter Sum. Ass. 1801, cor. Graham B. MS.

ing

Ch. XVI. § 154. *Who a receiver or accomplice.*

ing the barilla on shore; and Disting, together with several others, were employed as labourers in removing the barilla after it was landed to Hawker's warehouses. The jury found, that while the barilla was in Dyer's boat, some of his servants without his privity, consent, or participation severed some of the barilla from the rest where it was stowed, and removed it to another part of the boat, where they concealed it under some rope. But they also found, that Dyer afterwards assisted the other prisoner and the persons on board who had before separated this part from the rest *in removing it from the boat for the purpose of carrying it off.*

It was objected for the prisoner Dyer, that his offence was not that of a principal, as laid in the indictment, but that of receiver or accessary after the fact. But Graham B., before whom the trial was had, thought, that so long as the barilla remained in the boat the offence as to Dyer could not be said to be complete, but that it was one continuing transaction to the time of the complete carrying off of it from the boat: and he directed the jury accordingly; who found the fact specially as above stated, and that both the prisoners were guilty. Graham B. however deferred passing sentence till the next day, when he said that after consultation with the other Judge (Mr. Justice Le Blanc) he was now fully satisfied that his opinion was well founded. That though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would have been complete, as being an asportation in point of law, yet with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat, where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit; and Dyer having assisted in the act of carrying it off, was therefore guilty as principal.

Rex v. Atwell, and O'Donnell and others, at the same time.

Another case arose out of the same transaction. The rest of the barilla was lodged in M. Hawker's warehouse. While it was there, it appeared that several persons employed as labourers or servants by him entered into a conspiracy to steal some of it; and accordingly some of them who had access to the warehouse removed a parcel of it nearer to the door

door than it was before in the course of the morning; and about nine at night these persons together with Atwell and O'Donnell, who had in the mean time agreed to purchase it of the others, came to the warehouse yard, and assisted the others, who took it out of the warehouse, in carrying it away from thence. They being all indicted as principals in the felony, the same objection was made as before, that these two were only receivers or accessaries after the fact, the felony being complete before their participation in the transaction: but after the like consideration in this case as in the other, Graham B. said, that so long as the goods remained in the warehouse, which was the lawful place of their deposit, although to some purposes, as to those who severed this parcel from the rest for the purpose of stealing it, and more conveniently removing it afterwards, the felony might be said to be complete; yet it was a continuing transaction as to those who joined in the same plot before the goods were finally carried away from the premises: and all the Defendants having concurred in or been present at the act of removing them from the warehouse wherein they were lawfully deposited, they were all principals. And accordingly all the prisoners, found guilty on both indictments as principals in the two several transactions, received sentence of transportation for seven years.

Ch. XVI. § 154. *Who a receiver or accomplice.*

Taking a Reward to help to stolen goods.

§ 155 *a.* *Taking a reward to help to stolen goods.*

This is a kindred offence growing in truth out of the character of a receiver of stolen goods: for these confederates of the thieves, who are difficult to be discovered, frequently dispose of the goods stolen to the owners for a reward, under the pretence of helping them again to their stolen goods: it is therefore further provided by the st. 4 G. 1. c. 11. "that whenever any person taketh money or reward, "directly or indirectly, under pretence or upon account of "helping any person or persons to any stolen goods or "chattels; every such person so taking money or reward "as aforesaid (unless such person doth apprehend or cause "to be apprehended such felon who stole the same, and "cause him to be brought to trial for the same, and give "evidence against him) shall be guilty of felony, and suffer

4 G. 1. c. 11. s. 4.

Ch. XVI. § 155. *Taking a reward to help to stolen goods.*

" the pains and penalties of felony, according to the nature " of the felony committed in stealing such goods, and in " such and the same manner as if such offender had himself " stolen such goods and chattels in the manner and with " such circumstances as the same were stolen."

Reward, &c.

By stat. 6 Geo. 1. c. 23. s. 9. whosoever shall discover, apprehend, and prosecute to conviction of felony without benefit of clergy any offender against the above law shall be entitled to a reward of 40*l.* for every such offender, and a certificate, &c.

O. B. 1725. 4 Blac. Com. 132. Post. s. 166.

On the above statute of the 4 G. 1. the noted Jonathan Wild was convicted and executed; the principal felon being examined as a witness on the part of the crown.

Rex v. John Drinkwater, O. B. 1740. Leach, 18. *Whether offender triable after death of principal before conviction.*

Yet in Drinkwater's case it was doubted, the principal felon being dead, and not having been convicted of the offence, whether the person receiving the reward to help to the stolen goods could be convicted. The report says that the court (consisting, as appears, of Ld. C. J. Lee and Denton J.) conceived it to be a case of very great importance and of the first impression, and therefore reserved it for the opinion of the Judges; which was never publicly communicated; but the prisoner, after remaining some time in gaol, was discharged. This result of the matter, if accurately stated, seems to import that the objection prevailed: but it is very questionable whether the doubt there could have been founded on the ground suggested in the argument of the counsel for the prisoner, which was that the principal was not convicted, nor the record of such conviction given in evidence to support the allegation of her having committed the felony. For, without inquiring whether the principal had been previously convicted in Jonathan Wild's case, the very terms of the statute itself preclude the supposition of a conviction of the principal being a necessary preliminary to the trial and punishment of the offender under this statute; for it states that the offender, " *unless he doth apprehend or cause* " *to be apprehended the felon who stole the goods, and cause such* " *felon to be brought to his trial for the same, and give evidence* " *against him*, shall be guilty of felony, *and suffer the pains* " *and penalties of felony*," &c. I therefore rather presume that the true ground of the doubt entertained there was, because

It seems he had not. *Vide* the argument in Drinkwater's case, 1 Leach, 21, 2.

because by the death of the principal the stipulated condition had become impossible to be performed without any default of the Defendant. Ch. XVI. § 155. *Taking a reward to help to stolen goods.*

In prosecutions on this statute it seems proper to aver that the Defendant had not apprehended or caused to be apprehended the principal, &c. such reservation being in the enacting clause, and part of the description of the offence.

Advertising a Reward for the Return of stolen Goods, &c.

In furtherance of the laws against receivers, and to check as much as possible their nefarious traffic, it is also enacted by stat. 25 Geo. 2. c. 36. s. 1. "That any person "publicly advertising a reward, with no questions asked, "for the return of things which have been stolen or lost, "or making use of any words in such public advertisement "purporting that such reward shall be given or paid, without seizing or making inquiry after the person producing "such things so stolen or lost; or promising or offering in "any such public advertisement to return to any pawnbroker or other person who may have bought, or advanced "money by way of loan upon, such things so stolen or lost, "money so paid or advanced, or any other sum of money "or reward for the return of such thing; and any person "printing or publishing such advertisement; shall respectively forfeit the sum of 50*l.* for every such offence to any "person who will sue for the same." § 155. (*b*) 25 G. 2. c. 36. *Advertising a reward for stolen goods, &c. subjected to forfeiture.*

VI. *Of the Trial, Indictment, Appeal, Evidence, Verdict, and Clergy.*

The offences of larceny and robbery, like all others, must be tried in the same county or jurisdiction wherein they were committed. In ascertaining which it is necessary to advert to two leading principles from which certain deviations which will be noticed are exceptions. § 156. *Trial.* 2 Hale, 163.

1. That the possession of goods stolen by the thief is a larceny in every county into which he carries the goods; because the legal possession still remaining in the true owner, every moment's continuance of the trespass and felony amounts 1 Hale, 507, 8. 536. 2 Hale, 163. 1 Hawk. ch. 33. s. 9. 2 Hawk. ch. 25. s. 38. 2 MS. Sum. 251. 439.

Ch. XVI. § 156. *Trial.*

amounts to a new caption and asportation. And therefore if one steal goods in the county of A. and carry them into the county of B. he may be indicted or appealed of larceny in the latter county; though he can only be charged with robbery in the county where the force or putting in fear was.

Stealing at sea.
1 Hawk. ch. 33. s. 9.
3 Inst. 113.
13 Co. 53.
2 MS. Sum. 285. 440.

To this however there are some exceptions; as where the original taking is such whereof the common law cannot take cognizance; as of goods obtained by theft or robbery at sea, and afterwards carried into some county; in which case the common law gives no jurisdiction to inquire of the felony.

In Scotland.

Rex v. Anderson and others, Carlisle Sum. Ass. 1763, cor. Gould J. and afterwards before all the Judges in Nov. 1763. MS. Crown Cas. Res. 16. 2 MS. Sum. 251. 440, 1. 13 G. 3. c. 31. s. 4.

And the same exception prevailed till lately in cases where the original taking was in Scotland: it was ruled that a felon in such case could not be indicted in Cumberland where he was taken with the goods. But now by the stat. 13 Geo. 3. c. 31. s. 4. "If any person or persons having stolen or "otherwise feloniously taken money, cattle, goods, or other "effects in either part of the united kingdom (i. e. of Scotland and England) shall afterwards have the same money, "&c. or any part thereof in their possession or custody in "the other part of the united kingdom, it shall and may "be lawful to indict, try, and punish such person or persons "for theft or larceny in that part of the united kingdom "where they shall so have such money, &c. in their possession or custody; as if the said money, &c. had been stolen "in that part of the united kingdom."

Receivers.

And by s. 5. "if any person or persons in either part of "the united kingdom shall hereafter receive or have any "money, cattle, goods, or other effects, stolen or otherwise feloniously taken in the other part of the united "kingdom, knowing the same to be stolen or otherwise "feloniously taken; every such person or persons shall be "liable to be indicted, tried, and punished for such offence "in that part of the united kingdom where they shall so "receive or have the said money, &c. in the same manner "to all intents and purposes as if the said money, &c. had "been originally stolen or otherwise feloniously taken in that "part of the united kingdom."

Wales. Wreck.
26 G. 2. c. 19. s. 8. ante, s. 86.

Also in the case of plundering the effects of any vessel wrecked or in distress, which is ousted of clergy by the stat. 26 Geo. 2. c. 19. before adverted to, it is enacted, s. 8. "That

"That if the fact be committed in Wales, then the prose- Ch. XVI. § 156.
"cution shall or may be carried on in the next adjoining *Wales. Wreck.*
"English county," in the manner therein mentioned.

Parry and Roberts were indicted on this statute in Salop for an offence committed in the isle of Anglesea; and the objection was taken that Cheshire was "the next adjoining "English county," (of which evidence was given;) and therefore that the trial ought to have been there and not in Salop. It was observed that there was a difference between the penning of the statute 26 H. 8. c. 6. s. 6. which gives the general jurisdiction to the English Judges to try offences committed in Wales, and that of the 26 Geo. 2. c. 19. s. 8. in question; for the former of those statutes says, "that the justices of gaol delivery, &c. in the shire or "shires of England *where the king's writ runneth* next ad- "joining to the lordship, marches, or other places in Wales "where the offence was committed shall have full power "and authority," &c. But the stat. 26 Geo. 2. omits the words "*where the king's writ runneth.*" But all the Judges in Nov. 1774 were of opinion that it was no mistrial: that "the next adjoining English county" in the latter statute meant, as in the former, "where the king's writ runneth;" namely, that the offence should be tried by an English judge and jury: and that Chester was not to be considered as an English county within either of those acts.

Rex v. Parry and Roberts, Salop Sum. Ass. 1774. MS. Gould J. (*Vide* S. C. 1 Leach, 125.)

Salop, and not Cheshire, is "the "next adjoining "English coun- "ty" to Angle- sea, within the meaning of the statute; being the next where the King's writ runs.

With the like view of securing an impartial trial the 8th section of the same act of 26 Geo. 2. c. 19. gives an option to the prosecutor, even where the fact is committed in an English county, to prosecute in the adjoining English county.

Ante, p. 649.

§ 157.

Aggravated larcenies.

2. The second leading principle which governs the trial of these offences is, that where clergy is ousted on circumstances of aggravation, such circumstances must *all* be proved to have happened within the county in which the offender is tried; otherwise the fact of the larceny only being established in that county, he will be entitled to clergy.

To this an exception is furnished by the stat. 25 H. 8. c. 3. (revived and confirmed by the stat. 5 & 6 Ed. 6. c. 10.) which, reciting (s. 1.) "that felons and robbers committed "divers

25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10.

Goods obtained by burglary or robbery in another county.

Ch. XVI. § 157. *Goods taken by robbery, &c. in another shire.*

1 Hale, 519.

" divers heinous robberies and burglaries in one shire, and " conveyed the spoil into another shire, and had been there " taken, indicted, and arraigned upon feloniously stealing " the said goods, and not upon the robbery or burglary; " for that it was not committed in the same shire where " they had been so indicted or arraigned; by reason of " which the said felons, robbers, and burglars had the be- " nefit of their clergy;" enacts (s. 3.) " that if any person " or persons be indicted of felony for stealing any goods or " chattels in any county within the realm of England, and " thereupon arraigned and be found guilty, or stand mute " of malice, or challenge peremptorily above the number " of twenty persons, as is aforesaid; or will not upon his said " arraignment directly answer to the same felony; that then " the same person and persons so arraigned and found guilty, " or who stand mute of malice, or challenge peremptorily " above the number of twenty persons, or will not directly " answer to the law, shall lose and be put from the benefit " of their clergy, in like manner and form as they should " have been if they had been indicted and arraigned and " found guilty in the same county where the same robbery " or burglary was done or committed; if it shall appear to " the justices before whom any such felons or robbers be " arraigned, by evidence given before them, or by exami- " nation, that the same felonies whereupon they be so ar- " raigned had been such robberies or burglaries in the same " shire where such robberies or burglaries were committed " or done, by reason whereof they should have lost the be- " nefit of their clergy by force of the said statute, in case they " had been found guilty thereof in the same shire where " such robberies or burglaries were so committed or done."

2 Hawk. ch. 33. s. 81.
1 Hale, 518, 519.
2 MS. Sum. 253. Sum. 241.

These statutes extended not to outlaws or persons appealed, nor to offences committed out of England, nor to such stealing as is excluded from clergy by subsequent statutes: but these omissions are, except as to appeals, supplied

3 W. & M. c. 9. s. 3.

by the stat. 3 W. & M. c. 9. s. 3. whereby " If any person " or persons indicted of felony for stealing of any goods or " chattel in any county of England, Wales, or town of " Berwick-upon-Tweed, and thereof be convicted or at- " tainted, or upon arraignment stand mute, or will not di- " rectly

" rectly answer to the indictment, or challenge peremptorily above twenty, &c. he or they shall be excluded from the benefit of clergy, if it appear upon evidence or examination before the justices that the said goods or chattel were taken by robbery, or burglary, or in any other manner, in any other county, whereof if such person or persons had been convicted by a jury of the said other county, he or they *are* excluded by virtue of this or any other act from having the benefit of clergy."

Ch. XVI. § 157. *Goods taken by robbery, &c. in another shire.* 4 Blac. Com. 305.

But this statute does not extend any more than the former to larcenies ousted of clergy by subsequent statutes; for the words are " *are* excluded." And neither of these statutes extends to appeals or to accessaries. It is also observed that these statutes, speaking only of counties, do not extend to cases where the thief is taken with the goods in a liberty or corporation. But this I apprehend must at least be intended where such liberty or corporation has jurisdiction of the felony, and the trial is had there.

2 MS. Sum. 253. 440. 544. MS. Tracy, 241. *Vi.* 1 Hale, 519, 520. & 1 Ed. 6. c. 12. 11 Co. 31.

It seems plainly to be understood, though not expressed in the statute of King William, that the offender must have been possessed of the goods in the county in which the trial is had, otherwise he cannot be convicted of larceny in such county. Hence it is, if the value of the goods so found there do not exceed 12*d.* the offender can only have the proper judgment for petit larceny, and no other, in respect of the robbery, &c. proved in another shire upon the evidence or examination: for being convicted of no offence which will warrant a judgment of death, and consequently having no need to demand clergy, he cannot be hurt by being excluded from the benefit of it.

2 MS. Sum. 253. 439. 2 Hawk. ch. 33. s. 83. 1 Hale, 536. 2 Hale, 349. 351.

§ 158.

The words of the statute of W. & M. " if it appear upon " evidence or examination," &c. are to be intended not only where the party is found guilty by the jury upon plea of not guilty, but also where he stands mute or challenges peremptorily above twenty, or will not directly answer, or is outlawed, or confesses. The same words in the stat. of Hen. 8. could not apply to the case of outlawry, that being omitted in the former part. And Lord Hale was of opinion that they did not extend to the case of a confession upon

Appearing on evidence or examination. 2 Hawk. ch. 33. s. 82. & 28. & 31. 2 Hale, 348. 1 And. 114. 2 MS. Sum. 253. 1 Hale, 518.

Ch. XVI. § 158. *Goods taken by robbery, &c. in another shire.*

upon record. Yet it seems that though the latter might not fall within the stat. of Hen. 8. it is within that of W. & M. which has the words "*convicted or attainted.*" But the reasoning of Hawkins goes to both statutes; for he says that a statute taking away clergy from those who shall be *found guilty* extends as well to those who shall *confess* themselves guilty upon record, as to those who shall be found so by verdict; for the former are found guilty by the court on conviction from their own mouths, which is evidence of the highest nature possible.

2 MS. Sum 253. 439. 543. Dub. 2 Hawk. ch. 33. s. 28.

And if the indictment contained an averment that the goods were taken by robbery, &c. in another county, to which the prisoner pleaded guilty; that may be thought to get rid of the difficulty above suggested; for then the fact would clearly appear to the court by examination of the record itself.

1 Hale, 518. 2 Hawk. ch. 33. s. 82. 2 MS. Sum. 253. 440. 543.

It is agreed, however, on all hands, that there is no need to make any entry on the record that it appears by such evidence or examination that the felony was originally committed in a different county, and was of such a nature that the offender could not have had his clergy there; though it is usual to make such entry. It is also said to be usual to write in the margin of the indictment that it is for robbery, &c. in another county.

Butler's case, O. B. Jan. 1720. Serjt. Forster's MS.

Butler was indicted for stealing goods of great value from Sir Justinian Isham and others. Upon evidence it appeared that they were robbed upon the highway in Hertfordshire, and that the goods were found upon the prisoner in Middlesex: and it appearing also in evidence that the prisoner was the person who robbed them in Hertfordshire, he received sentence of death, and was executed.

R. v. Evan Evans, O. B. Aug. 1706. Burnet's MS. 69. 2 MS. Sum. 544.

But in Evan Evans's case, who was indicted for larceny at the O. B.; it appearing that the goods were taken from the owner by robbery in Essex; but there being no evidence that the prisoner was present, unless the finding of the goods upon him in Middlesex, he had his clergy upon mature deliberation by Holt C. J. and two other Judges.

Yet quære in the above case if the evidence of finding the goods on the prisoner were of such a nature as would be evidence

evidence against him of his having committed the robbery in the county where the fact happened? Ch. XVI. § 158.

Goods taken by robber, &c. in another shire.

It is said that Eyre C. J. (*a*) was of opinion, that it was discretionary in the Judge by these statutes, whether he would examine into the circumstances of the fact in the other county so as to oust the prisoner of clergy. But I know of no principle whereon to found such a discretion in a Judge to admit or refuse legal evidence. But what was also said by the same Judge is deserving of consideration, that in order to oust clergy on the statute it must be by counterplea to the prayer of clergy.

Serjt. Forster's MS.

(*a*) The first of that name.

Vi. 2 MS. Sum. 254.

With respect to the trial of the receivers of stolen goods, I have already noticed what was necessary to be stated in this respect in what was before said touching the general description of these offenders.

Receivers.

Ante, s. 142.

Indictment, Evidence, and Verdict.

§ 159.

Form of indictment in larceny.

The next object of consideration is the form of the indictment in larceny, and the general evidence applicable thereto, to warrant the finding of the jury on the charge as laid. Much of this branch of the subject having been already very fully considered, in treating of the several constituent parts of the offence, I shall do little more than advert to the former heads. 1. The indictment for simple larceny ought to state the kind of goods stolen: merely charging the prisoner with having stolen *the goods and chattels* of another is not sufficient: Though the unnecessary addition of those words has been holden not to vitiate an indictment otherwise good. But bills, bank notes, &c. may be described in a general manner, and need not be set out verbatim. It is the more necessary to state the description of the property in order that it may appear upon the face of the indictment that the thing taken is such whereof larceny may be committed. And therefore, if primâ facie it is not the subject of larceny, as an animal feræ naturæ, the indictment must shew it to be dead, tame, or confined, in which state it may be the subject of individual property. There is this further reason too, that the court may be enabled to see what judgment ought to be pronounced upon the whole of the indict-

Ante, s. 27, &c.

2 Hale, 182, 3.

Ante, p. 601, 2.

Ante, 607. 651.

Ch. XVI. § 159. *In simple larceny.*

ment. However, it has been ruled that a charge of stealing a piece of linen of A. N. without laying it to be his *goods and chattels*, was uncertain and bad; and therefore it is not safe to omit them; though that case may have turned more upon the supposed want of a sufficient allegation that the linen was the property of A. N. than upon the omission of those particular words. Also the number of things stolen of the same kind should be stated, as 20 sheep, &c.: and whatever property is omitted to be stated in an appeal of larceny is in strictness confiscated. 2. The indictment should state the value of the goods, in order that it may appear whether the offence be grand or petit larceny; and the value of each of the several kinds of property specified in the indictment ought properly to be added. 3. Also to whom the property of the goods stolen belongs: in which respect nothing remains to be added to what was before noted, except that there is no need to give any addition to the owner, though sometimes it may be convenient for distinction sake to do so. 4. The indictment must allege that the prisoner *took and carried away* the goods. Lord Hale refines on this when he says, that it should be *cepit et asportavit* in case of dead chattels, *cepit et abduxit* in the case of a horse, *cepit et effugavit* in case of sheep, &c. 5. The offence must be charged to be committed *feloniously* as in case of other felonies: saying only that the prisoner *stole* the goods, &c. is not sufficient. Other matters are referable to the general head of indictment.

Long's case, Cro. Eliz. 490. 2 Hawk. ch. 25. s. 71.

Sum. 184.

2 Hale, 183.

2 Hale, 181.

Dy. 99.

Ante, 650, &c. 2 Hale, 182.

2 Hale, 184. 1 Hale, 504, 8.

Ante, 554.

Staundf. 24. b. *Vide* Kel. 29. and Rex v. Scofield, Cald. 401.

One indicted of grand larceny may be convicted and have judgment of petit larceny only; but not of trespass.

Ante, s. 134.

§ 160. *In aggravated larcenies.*

In all cases of aggravated larceny from which clergy is excluded by statute, the indictment ought to state precisely, and the evidence ought to establish, the substantial and distinguishing facts which constitute the offence; with the exception before noticed as to robbery and burglary in another county: and if either the indictment or the proof be defective in any one particular the prisoner is entitled to be acquitted of the capital part of the charge; though the offence proved, if it had been properly laid, would have been ousted of clergy by some other statute. But the indictment may

1 Hale, 517. 525. 535. 561. 2 Hawk. ch. 33. s. 25. MS. Burnet, 79. (*Vide* ante, Burglary, p. 515.)

Ante, s. 157.

may be so framed as to include several capital charges, and if any one be proved the offender will be ousted of clergy. As where the charge is for breaking and entering the dwelling house in the night and stealing therein to the amount of 40*s.*; he may be acquitted of the burglary and found guilty of stealing to the amount of 40*s.* in the dwelling house; from which clergy is ousted by the stat. 12 Ann. c. 7. And in all cases of aggravated larcenies he may be convicted of the simple larceny if that be proved, although the indictment conclude against the form of the statute. Yet such a conclusion is not necessary to oust clergy where the indictment is framed upon a statute ousting clergy under circumstances from that which was before felony at common law. As to the form of entering the verdict in such cases, what was before said in another place will suffice.

Ch. XVI. § 160.
In aggravated larcenies.
Ante, tit. Burglary, p. 515.
1 Hale, 535, 561.
Ante, 516, &c.

§ 161.
Larceny and robbery in houses, &c.

In the particular instances of larceny and robbery in houses, &c. the several offences relating to which have been before largely discussed; in order to oust the offender of clergy some or other of these things must be stated in the indictment: 1. a breaking of the house, some person being therein; or, 2. a putting in fear of some person therein, which must be stated to be done by the prisoner; in both which cases there must be an entry likewise charged; and the value of the goods taken must be above 12*d.* and so laid in the indictment, otherwise the offence amounts but to petit larceny, and does not require the benefit of clergy; or, 3. a breaking and entering in the day time and stealing to the value of 5*s.* no person being in the house at the time; or, 4. stealing privately in a shop, &c. to the value of 5*s.* though no person be therein; or, 5. a stealing in a dwelling-house or outhouse to the value of 40*s.* In all these instances the indictment ought also to set forth the general description of the goods and their value, and of the house out of which they were taken; in order that the case may appear on the face of the record to be brought within one or other of the several statutes. It is also proper upon indictments under these statutes not only to state in whom the property of the goods stolen is, as before expressed, but also the name of the owner of the house out of which they are taken. In

Ante, 623, &c.
Ante, 635.
Vide ante, 644.

White's

Ch. XVI. § 161. *In houses, &c.*

White's case, O. B. Feb. 1783. 1 Leach, 286.

Woodward's case, O. B. Oct. 1785, cor. Adam Serjt. R. ib. 287. *vide* Trapshaw's case, ante, 506.

R. v. Davis, alias Silk, O. B. 1800. MS. Jud. ante, 499.

Robbery. Ante, s. 138. *Vide* post. s. 168. *Vide* ante, p. 415. Ante, 741.

White's case, where the prisoner was indicted for burglary and stealing goods in the dwelling house of J. S. to the amount of above 40*s.* it not appearing to be J. S.'s house, Gould and Buller Js. held that the prisoner could neither be convicted of the burglary nor upon the stat. 12 Ann. c. 7. The like was ruled in Woodward's case, for stealing in the dwelling house of Sarah Lunns, whose name turned out to be S. London. Trapshaw's case was reserved on a doubt whether the indictment, which was framed on the stat. 3 & 4 W. & M. c. 9. for breaking and entering the dwelling-house of J. L. in the day time, his wife being therein, and stealing goods, properly laid to be the dwelling house of J. L.; but the judges on conference thought it right. And in the case of an indictment laying the larceny to be in a *dwelling* house to the value of 40*s.* it has been expressly holden by all the Judges, that as the house was not such wherein burglary might be committed, the prisoner could not be convicted within the stat. 12 Ann. c. 7. The materiality, however, of such an averment is entirely out of the question upon an indictment for robbery, where it has been holden to be mere surplusage, and that it may be rejected. But that turns on the stat. 3 W. & M. c. 9. which ousts clergy in all cases of robbery generally; and therefore the place where the offence is committed is mere matter of form. But under the statutes in question the place is of the essence of the offence so far as respects clergy, and therefore ought to be accurately described in the indictment.

§ 162. *Indictments for larceny of particular goods, or by particular persons.*

In respect to indictments for larceny of particular goods, or by particular persons, from whence clergy has been ousted by different statutes, it seemed more convenient to state all the determinations upon the construction of such statutes under the respective heads into which they were distributed; to which I refer.

§ 163. *Indictment against receivers.* Rex v. Stott, H. 39 G. 3. B. R. Ante, 753. *Allegation of time and place.*

The indictment against a receiver of stolen goods need not allege time and place to the fact of stealing the goods: it is sufficient if they be alleged to the fact of the receipt. This was expressly decided upon consideration in Stott's case, upon an indictment against him as a receiver of pieces of

of iron, which was removed into B. R. by writ of error after judgment against him of imprisonment by the Quarter Sessions; though ultimately the court gave no opinion on the rest of the case, the writ of error being abandoned by the prisoner. It appeared on inquiry of the clerks of assize of the Western and Oxford circuits, and of the clerk of the arraigns at the Old Bailey, that such had always been the form of indictment used by them.

Ch. XVI. § 164. *Against receivers.*

In the case of John Thomas the indictment was for receiving goods stolen by persons unknown: which was objected to be insufficient in not ascertaining the principal thief, and that it ought to appear to whom in particular the prisoner was accessary. This objection being referred to the Judges, they were unanimously of opinion that the indictment was good; that the great view of the statutes was to reach the receivers where the principal thieves could not easily be discovered.

Thomas's case, O. B. May 1766. 2 MS. Sum. 400. MS. Jud. Ante, 651. *Principal unknown.* Infra.

Where the principal however is known, it seems proper to state it according to the truth: and the common form of the indictment is to state the fact of stealing the goods by the principal, and the receipt of them by the receiver, he then and there well knowing the said goods and chattels to have been feloniously stolen, &c. But possession alone of the king's stores, with the king's marks, is sufficient to constitute the offence by statute, unless accounted for in the manner before stated. And it is sufficient if the thing received be the same in fact as that which was stolen, though passing under a new denomination, as where the principal was charged with stealing a live sheep, and the accessary with receiving 20lb. of mutton, *part of the goods stolen.*

(*Vide* Kirnan's case, tit. Indictment—Surplusage.) Ante, 765.

Cowell and Green's case, ante, s. 48.

§ 164. *For misdemeanor.*

On an indictment upon the stat. 22 Geo. 3. c. 58. s. 1. against a receiver for a misdemeanor, on which he was convicted, the case came before ten of the Judges present at a conference in Trinity term 1792, who were of opinion that the second count, which stated the felony to be petit larceny only, was good; this being a misdemeanor: and that the first count was also good, which stated that the principal was unknown; for that was equivalent to saying that he was not convicted. And the majority agreed that the

Baxter's case, Trin. T. 1792. MS. Buller J.

Ch. XVI. § 164. *Against receivers.*

the averment that the principal was not convicted was not necessary in any case; for it would be a negative averment, which, if laid, need not be proved by the prosecutor; but was evidence for the Defendant; and if proved by him, would entitle him to an acquittal for the misdemeanor. This latter point was also determined by B. R., into which the record was brought by certiorari, upon a motion in arrest of judgment. Neither is it necessary in such an indictment to aver that the principal cannot be taken.

Rex v. Baxter, M. 33 G. 3. 5 Term Rep. 83. Rex v. Pollard and Taylor, 2 Ld. Ray. 1370. 3 MS. Sum. 44. *Vide* ante, s. 142.

§ 165. *Averring conviction of principal.*

The receiver being, by the stat. 3 W. & M. c. 9. s. 4. made an accessary after the fact to the felony, the same method of charging the principal fact which obtains in case of accessaries in general will suffice against the receiver.

Hyman's case, Kingston assizes, 1801, cor. Heath J. MS. Jud. *Sufficient in indictment against receivers to state conviction (without attainder) of principal, and subsequent receipt of goods with knowledge.* *Vide* Indictment —Accessaries.

In Hyman's case, the indictment stated, that at the gaol delivery of Newgate, holden on Wednesday the 18th of February last, James Barnes was *convicted* on an indictment for burglary in the dwelling house of William Kerr, at Sunbury in the county of Middlesex, and stealing therein the goods and chattels there mentioned; and that after the said burglary and felony was done and committed, the prisoner, on the 9th day of the said February, the said goods and chattels feloniously did receive and have, well knowing the same to have been stolen and carried away, against the statute, &c. The prisoner was convicted; and it was moved in arrest of judgment that the indictment was bad, because it was not stated therein that the principal was *attainted;* and Heath J. reserved the point for the opinion of all the Judges; who all held the indictment good, as well on the authority of a number of precedents at the O. B. and on the home circuit, where the same form of indictment had been usually pursued, as also on the consideration of the stat. 1 Ann. st. 2. c. 9. s. 1, 2.

§ 166. *Principal a witness.*

It is now agreed that the principal, though not convicted or pardoned, may be examined as a witness against the receiver. In Patram's case, and in Haslam's case, which were prosecutions for the misdemeanor on the stat. 22 Geo. 3. c. 58. the principal felons, though not convicted, were admitted as witnesses on the part of the crown. The same

Patram's case, Bridgewater Sum. Ass. 1787, cor. Grose J. MS. Haslam's case, O. B. 1786. 2 Leach, 467. and before all the judges.

was

was done in Jonathan Wild's case, on a prosecution on the stat. 4 Geo. 1. c. 11. for taking a reward to help to stolen goods. Ch. XVI. § 166. *Principal a witness.* Wild's case, ante, s. 155.

§ 167. *In robbery.*

The form of indictment for robbery is principally distinguishable from that for larceny in these particulars, that it states an assault upon the person, and a taking of his goods, &c. by violence or putting him in fear, though both these are usually added. It may run thus, That the Defendant, on, &c. with force and arms, at, &c. in and upon J. S. &c. feloniously did make an assault, and him the said J. S. in bodily fear and danger of his life then and there feloniously did put, and certain goods of such a value of the said J. S. from his person and against his will then and there feloniously and violently did steal, take, and carry away, &c. 1 Hawk. ch. 34. s. 10. Crown Circuit Comp. 339. Co. Entr. 358. b.

The assault must be laid to be made feloniously; otherwise though the putting in fear and the taking be afterwards laid to be done feloniously, the indictment is ill. R. v. Pelfryman and Randal, O. B. Oct. 1791, cor. Hotham B. and Heath J. 2 Leach, 641.

The taking must be charged to be with violence from the person and against the will of the party: but it does not appear certain that the indictment should also charge that he was put in fear; though this is usual, and therefore safest to be done. But in the conference on Donally's case, where this subject was much considered, it was observed by Eyre B. that the more ancient precedents did not state the putting in fear, and that though others stated the putting in corporal fear, yet the putting in fear of life was of modern introduction. Other Judges considered that the gist of the offence was the taking, &c. by violence, and that the putting in fear was only a constructive violence, supplying the place of actual force. In general, however, as was before observed, no technical description of the fact is necessary, if upon the whole it plainly appear to have been committed with violence against the will of the party. Fost. 128. 1 Hale, 534. 3 Inst. 68. *Vide* Crompt. 246. b. 247. and West. Symb. Donally's case, ante, 719. Ante, s. 127.

At the O. B. 1766, Thomas Smith was indicted for assaulting the prosecutor with force and arms, and putting him in corporal fear, and taking a sum of money from his person against his will. The prisoner's counsel objected that, according to Lord Hale, all indictments of robbery must shew that Smith's case, 2 MS. Sum. 261. & MS. Gould J. 1 Hale, 534.

Ch. XVI. § 167. *In robbery.*

that the taking was done *violenter:* and as that was not charged in the present indictment, the prisoner was entitled to his clergy. This point being reserved for the opinion of the Judges, they all agreed that a robbery was sufficiently described in this indictment. That the word *violenter* was no technical term essentially necessary in the indictment: if it appeared upon the whole that the fact was committed with violence it was sufficient to constitute a robbery: and here it was charged that the prisoner put the prosecutor in fear, and took the money from his person against his will. It was all one continued act, begun with putting the prosecutor in fear, and completed by taking the money from him against his will. That Lord Hale, in the passage referred to, was inaccurate in his expression; but the definition which he gave of robbery was, a felonious taking from the person with violence; and if the fact were so described in the indictment as to answer the definition, it came up to Lord Hale's own doctrine.

1 Hale, 534, 5, 6.

But here, as in all complicated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely, the fear or violence, and found guilty of the simple larceny. Yet where upon an indictment for robbery from the person, a special verdict was found stating facts which in judgment of law did not amount to a taking from the person, but shewed a larceny of the party's goods; yet as the only doubt referred to the court by the jury was, Whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment, the Judges thought that judgment as of larceny could not be given upon that finding; but they remanded the prisoners to be tried upon another indictment for that offence.

Rex v. Francis and others, before all the Judges at Serjeants' Inn, Com. Rep. 478. Rep. temp. Hardw. 115.

§ 168. *Allegation of place.*

Many nice cases have been determined as to what should be considered as a robbery in or near the king's highway, and as to the manner of laying it in the indictment; which it seems was most usually done in the disjunctive, " in or near," &c. But these are now become unnecessary to be considered since the passing of the stat. 3 W. & M. c. 9. first mentioned in all cases at least falling within the statute; more especially after the several subsequent determinations which

1 Hale, 535, 6. MS. Burnet, 74.

Ante, 741.

which have been made. Several malefactors took a house, and sent for a tradesman thither under pretence of buying goods from him, and robbed him there. The indictment alleged the offence to have been committed *near the king's highway;* and it was holden to be within the stat. of 1 Ed. 6. c. 12. s. 10. But this may well be doubted, if such really were the determination; for the device of charging a robbery in the dwelling-house to be near the king's highway seems to confound distinct offences. It is more probable that it was holden to fall within the stat. 3 W. & M. c. 9. which is sufficient to reach such a case without any device of that kind. For that statute is so generally worded that it takes in all sorts of robbery, either in a highway, house, or elsewhere. And this is the more probable from a subsequent case of Summers and others, who were in the like manner indicted for a robbery near the highway, and taking 13*l.* from the person of J. H.; on which a special verdict was found that J. H. went to an alehouse in Smithfield, and there was set upon and robbed. And all the Judges, at Serjeant's Inn, on the 25th May 1705, held, that though the indictment were special for a robbery near the highway, and this in a house was not so; yet as the stat. 3 Will. & M. took away clergy in all robberies, the prisoners should not have their clergy. Again, in the case of Darnford and Newton, at the O. B. Gould J. Hotham B. and Buller J. determined upon the same principle; where the robbery was in a house in a street hired by one of the prisoners for the purpose, but not inhabited by any one; and the indictment charged the robbery to have been committed in the dwelling-house of that prisoner.

Ch. XVI. § 168. *In robbery.*

2 MS. Sum. 264. Fowler's case, O. B. 10 W. 3.

Ante, 625.

Ante, 629.

R. v. Summers and others, O.B. 20th Feb. 1705. 2 MS. Sum. 264. 547. by a note of Nares J. ex relatione Parker C. B. from Mr. J. Price's MS.

R. v. Darnford and Newton, O. B. Sept. 1780. 2 MS. Sum. 264. 547.

And, lately, all the Judges held that one Wardle was ousted of clergy upon an indictment charging him with robbing another in a field near the highway; on a finding by the jury that he was guilty of the robbery, but not near the highway.

Wardle's case, Derby Lent Ass. 1800, cor. Chambre B. MS. Buller J. & MS. Jud.

It is equally immaterial, as was just before observed, in the case of robbery, whether the ownership of the house be properly described in the indictment.

John Pye was convicted upon an indictment which charged him with robbing Robert Fernyough in the dwelling-

Pye's case, Warwick, 1790, cor. Thomson B. MS. Buller J. & MS. Jud.

Ch. XVI. § 168. *In robbery.*

ing-house of Aaron Wilday. The fact was committed in a house, but it did not appear who was the owner of it. But on reference to the Judges, in Easter term 1790, they all held the conviction proper.

S. Johnstone's case, 1793, cor. Ashhurst J. MS. Buller J.

Susannah Johnstone was convicted on an indictment for robbing Richmond Dicken, in the dwelling-house of *Joseph* Johnstone, at Birmingham. The robbery was committed by the wife in the husband's house, whose christian name could not be proved. But in Easter term 1793 all the Judges held the conviction proper.

§ 169. *Appeal.*

Sum. 184. 2 Hawk. ch. 23. s. 44. 47. Keilw. 70. pl. 7. *Vide* ante, s. 90.

Concerning the appeal of larceny or of robbery, it lies by the party grieved against the felon; and a special property in the goods, though not a bare charge, is sufficient to maintain it: in which case the special owner may either declare generally as for his own goods; or specially as for the goods of the owner in his possession; and if two joint owners be robbed, the survivor may have an appeal; but it must expressly appear whose goods they were, in order to shew that the Plaintiff is entitled to the appeal. But though a man were robbed at several times before by the same person, he shall have but one appeal.

2 Hawk. ch. 23. s. 78.

Sum. 184. Hawk. ut supra.

As in the case of an indictment so in appeal, if one be robbed in the county of A. and the felon go with the goods into the county of B. an appeal of robbery lies in A.; but of larceny only in B.; for the stat. 25 H. 8. c. 3. extends only to the case of indictments. So if A. be robbed by B., who is robbed of the same goods by C., A. may have an appeal of larceny against C.

Ante, p. 771, 2.

Sum. 185. 2 Hawk. ch. 23. s. 48. 52. Staundf. 62. Post. s. 170.

There does not seem to be any precise limit of time for this appeal, provided there be fresh suit, of which the court are to judge in their discretion; as is elsewhere shewn. But it seems most proper to call in aid the assistance of the same jury which tries the felon, or an inquest of office to inquire specially, concerning such fresh suit.

VII. *Of*

VII. *Of Restitution of stolen Goods.*

Ch. XVI. § 170.

On appeal.

§ 170.

Restitution of stolen goods.

There are several methods by which the party robbed, or whose goods are stolen, may have restitution; 1 Hale, 538.

1. By Appeal of Robbery or Larceny;
2. By stat. 21 H. 8. c. 11. on Indictment;
3. By the Course of the Common Law.
4. By stat. 31 Eliz. c. 12. in case of horse-stealing.

By appeal.

1. The appeal must be brought upon fresh suit; but the time and manner of the pursuit is not now tied down to such strictness as formerly: for though the felon be taken by other persons, as the sheriff, &c. yet if the party robbed come within the year and enter his appeal, that is deemed a fresh suit, provided he had used reasonable diligence soon after the felony to apprehend and prosecute the felon; of which the justices, in discretion, are to judge; though without hue and cry raised. 2. If the principal felon, or any one of several, be convicted or attainted on such appeal; or such conviction become impossible notwithstanding the endeavour of the appellant; as by the death of the felon after he is taken, or a prior attainder at the suit of another; and the fresh suit be found by the verdict or by an inquest of office; the appellant shall have restitution of such of the goods as are mentioned in the appeal, notwithstanding a seizure by the lord, or a sale in market overt: but the goods omitted are forfeited to the king; and so are all the goods upon a false appeal, where it appears that the appellee did not come to the goods by felony. But the use of appeals is in a great measure superseded by the restitution given.

2 MS. Sum. 609. 611, 12. 1 Hale, 538. 540, 1. Crompt. Just. 191. 2 Hawk. ch. 23. s. 49, &c. Kel. 96. Bro. Abr. Judges, pl. 26.

Post. 789.

§ 171.

2. By the stat. 21 H. 8. c. 11. which first gave restitution upon an indictment; whereby it is enacted, "That if any "felon or felons do rob or take away any money, goods, or "chattels from any of the king's subjects, from their per-"sons or otherwise, within this realm; and thereof the said "felon or felons be indicted, and after arraigned of the "said felony and found guilty thereof, or otherwise attaint-"ed, by reason of evidence given by the party so robbed, or "owner of the said money, goods, or chattels, or by any "other

By 21 H. 8. c. 11. 2 MS. Sum. 610. 2 Hawk. ch. 23. s. 55, &c. 1 Hale, 542.

Ch. XVI. § 171. By stat. 21 H. 8. c. 11.

"other by their procurement; that then the party so "robbed or owner shall be restored to his said money, "goods, and chattels; and that as well the justices of gaol "delivery as other justices before whom any such felon or "felons shall be found guilty or otherwise attainted, by "reason of evidence given by the party so robbed or owner, "or by any other by their procurement, have power by this "act to award from time to time writs of restitution for the "said money, goods, and chattels, in like manner as though "any such felon or felons were attainted at the suit of the "party in appeal."

Vide Cas. temp. Hardwicke, 349. 1 Hale, 543, 6. 4 Blac. Com. 363. Kel. 48. 2 Inst. 714. MS. Tracy, 276.

The writ of restitution has fallen into disuse; but upon production of the goods at the trial the court orders them to be restored to the owner, without any inquiry as to fresh suit; and if not restored, he may maintain trover for them after conviction; and this notwithstanding a sale in market overt, as is now fully established. But restitution can only be had from the person in possession of the goods at the time of or after the felon's attainder. Therefore if a party purchase them bonâ fide in market overt, and sell them again before conviction, no action will lie against him for the value, though notice were given to him not to sell.

Horwood v. Smith, 2 Term Rep. 750.

2 MS. Sum. 612, 613. Staundf. 167. 1 Hale, 542. 545. 2 Hawk. ch. 23. s. 56. Kel. 48, 9. 3 Inst. 242. 4 Blac. Com. 363.

The construction of the above statute with respect to restitution upon conviction is in a great measure governed by the rules respecting appeals; though in one respect it is more favourable to the owner: for in prosecutions under this statute the practice is to award restitution, though there be no fresh suit, nor any inquest concerning the same, as is necessary in case of appeals. Yet if it appear that the owner has been guilty of gross neglect in prosecuting, Hawkins thinks that the court, in analogy to the proceedings in appeal to which the statute refers, may in their discretion deny restitution under this statute. Perhaps it might be thought sufficient in such a case to put the party to sue out his writ of restitution: for I find no instance where the writ itself has been denied on this ground; and the general opinion is that it cannot. If the testator be robbed, or the servant be robbed of his master's goods, the executor or master procuring conviction of the felon shall have restitution. Yet if divers persons be robbed, they must all in strictness convict the

2 Inst. 714.

the thief in order to entitle themselves to restitution. But the practice is after the felon is convicted upon one indictment, if the goods of other persons be found upon him, and brought into court, the court usually orders restitution to all who were ready to prosecute: or this may be done on an inquest of office, if there be any doubt as to the property. But the owner of stolen goods is not strictly entitled to have restitution of any other goods than those specified in the indictment; for the offender might have escaped by the omission.

Ch. XVI. § 171. By stat. 21 H. 8. c. 11.

Ante, 787.

If the thief sell the goods, and be immediately taken with the money, and the goods cannot be heard of, it has been questioned whether the prosecutor shall have the money. One book seems to incline to the negative opinion; but that when examined strictly only goes to establish that the prosecutor is not entitled to seize other goods, which for aught appears may be distinct goods of the felon, in lieu of those which were taken by him. But where it is clearly ascertained that the money is the produce of the goods stolen, it has been expressly adjudged to be within the equity of the statute giving restitution. As in Hanberrie's case, where a servant took gold from his master and changed it into silver: and in Harris's case, where one stole cattle, which he sold in market overt, and was immediately after apprehended with the money. And herewith Lord Hale agrees.

2 MS. Sum. 612.

W. Jones, 148. *Vide* Sty. 347.

Hanberrie's case, Cro. Eliz. 661. per Fenner J. Harris's case, Noy, 128. 1 Hale, 542. & *vid.* Gaughtly v. Reynolds, M. 13 G. 3. B. R. Loft. 90.

But the statute is confined to the restitution of goods stolen, and extends not to such as are obtained by fraud. And therefore where the owner prosecuted one to conviction who had obtained goods from him by fraud, and repossessed himself of the goods, which in the mean time had been pawned to another for a valuable consideration without notice, it was holden that the pawnee might maintain trover for them against the original owner.

Parker v. Patrick, 5 Term Rep. 175. Rex v. Devaux and other, 2 Leach, 665.

3. By common law. The necessity of prosecuting and convicting or attainting the felon in order to have restitution, is only when the property is changed by some intermediate act; as by the felon's waiving them in his flight; the seizing of them by the King's officers under suspicion of felony; or by the lord of the manor; or by a sale in market overt.

§ 172. *By common law.* 2 MS. Sum. 612. 614. Kel. 48. 2 Hawk. ch. 23. s. 49. 1 Hale, 546. 4 Blac. Com. 363.

Ch. XVI. § 172. *At common law.*

overt. For otherwise the owner may at common law peaceably retake them wherever he may find them, without any writ of restitution. But if the owner take them back from the offender with intent to favour him, it is unlawful, and punishable by fine and imprisonment. And so is the practice (now prohibited by statute) which prevailed much at one time of advertising a reward for bringing stolen goods, and no questions to be asked; which Lord Macclesfield declared to be a kind of compounding of felony, by stopping inquiry and prosecution in consequence of the owner's obtaining the goods again. But after conviction it is clearly no crime to take the goods again wheresoever they are found; for having prosecuted the law against the offender, the owner is entitled to restitution whenever he pleases; and may bring trover against any person in whose hands the goods are.

1 Hale, 546. n. *Vide* ante, 771. & s. 141.

§ 173. 31 Eliz. c. 12. *In horse stealing.* Ante, s. 47.

4. Special provision has been made for restitution in the instance of horse stealing, by the stat. 31 Eliz. c. 12. which for avoiding horse stealing requires certain entries to be made, &c. in the toller's books of the sale of horses in markets and fairs, and provides, (s. 4.) "That if any horse, "mare, gelding, colt, or filly shall be stolen, and after shall "be sold in open fair or market, and the same sale shall be "used in all points and circumstances as aforesaid, that yet "nevertheless the sale of any such horse, &c. within six "months next after the felony done, shall not take away "the property of the owner from whom the same was "stolen, so as claim be made within six months by the party "from whom the same was stolen, or by his executors or "administrators, or by any other by any of their appointment, at or in the town or parish where the same horse, "&c. shall be found, before the mayor or other head officer "of the same town or parish, if the same horse, &c. shall "happen to be found in any town corporate or market "town, or else before any justice of peace of that county "near to the place where such horse, &c. shall be found, "if it be out of a town corporate or market town; "and so as proof be made within forty days then next "ensuing by two sufficient witnesses, to be produced "and

" and deposed before such head officer or justice (who by Ch. XVI. § 173.
" virtue of this act shall have authority to minister an oath *In horse stealing.*
" in that behalf,) that the property of the same horse, &c.
" so claimed, was in the party by or from whom such claim
" is made, and was stolen from him within six months next
" before such claim of any such horse, &c. but that the
" party from whom the said horse, &c. was stolen, his exe-
" cutors or administrators, shall and may at all times after,
" notwithstanding any such sale or sales in any fair or open
" market thereof made, have property and power to have,
" take again, and enjoy the said horse, &c. upon payment or
" readiness, or offer to pay, to the party that shall have the
" possession and interest of the same horse, mare, gelding,
" colt, or filly, if he will receive and accept it, so much
" money as the same party shall depose and swear before
" such head officer or justice of peace, (who by virtue of
" this act shall have authority to minister and give an oath
" in that behalf,) that he paid for the same *bonâ fide*, with-
" out fraud or collusion; any law, statute, or other thing to
" the contrary notwithstanding."

For other matters, *vide* general heads, Rewards, Pardon, Expences, &c.

CHAP. XVII.

PIRACY.

Jurisdiction. - - - - - § 1.
By civil Law, Punishment capital. *ib.*
Triable as Marine Felony under King's Commission by Stat. 28 H. 8. c. 15. *ib.*
Nature and Extent of such Commission. § 2.
1. *What is Piracy.* - - - § 3.
i. Such Acts of Robbery and Depredation as would be Felony on Shore. *ib.*
Mariners seizing Captain and carrying away Ship explained by subsequent piratical Acts. *ib.*
But Breach of Trust no Piracy. *ib.*
ii. Foreigners acting at open Hostility no Pirates. § 4.
But Subjects acting under Colour of Foreign Commissions, Pirates by Stat. 11 & 12 W. 3. c. 7. *ib.*
iii. So if they act under Enemy's Commission by Stat. 18 Geo. 2. c. 30. - - - § 5.
Under these Acts, an adhering to the King's enemies by piratical Depredations at Sea, triable as Pirates. *ib.*
Cruising against the Ships of the King as well as the Subject shews Intent traitorous, not merely piratical. *ib.*
iv. Running away with Ship or Cargo, &c. Yielding voluntarily to Pirates; confederating with them, &c. Attempting to seduce Crew, &c. Laying violent Hands on Commander to hinder Defence, &c. Stirring Revolt, &c. Piracy by Stat. 11 & 12 W. 3. c. 7. s. 9. - - - - § 6.
v. Trading or corresponding with Pirates, Piracy and Death, by Stat. 8 Geo. 1. c. 24. - § 7.
vi. So forcibly entering Merchant Ship and destroying Goods on board. - - - § 8.

Burning

Burning or destroying Ship. *Vide* Tit. Malicious Mischief.

vii. Privateers ransoming neutral Ships made Prize, without bringing into Port, Piracy by Stat. 32 Geo. 2. c. 25. s. 12. - - - § 9.

Stat. 22 Geo. 3. c. 25. avoids Contracts for the Ransom of Ships captured by an Enemy, and subjects Party to a forfeiture of 500*l.* *ib.*

2. *As to the Place where the Fact is committed.* § 10.

Ancient Jurisdiction of B. R. over Felonies on the narrow Seas. *ib.*

Admiral's Jurisdiction not extending to Offences within Bodies of Counties. *ib.*

Rules for ascertaining the Line of Demarcation. *ib.*

3. *Principals and Accessaries.* - - § 11.

Procurers, Aiders, &c. on Land or Sea made Accessaries to Piracy by Stat. 11 & 12 W. 3. c. 7. s. 10. *ib.*

But by Stat. 8 Geo. 1. c. 24. declared to be Principals, and triable as such. *ib.*

4. *Indictment and Evidence.* - § 12.

Fact must be alleged to be done on the Sea feloniously and piratically. *ib.*

Not triable by Commission under Stat. H. 8. if within County. Nor as Larceny by common Law, if taken at Sea, and brought into County. *ib.*

Qu. As to Indictments for Piracy in B. R. *ib.*

5. *Trial and Judgment.* - - - § 13.

Stat. 28 H. 8. c. 15. directs that Felonies, Robberies, &c. on the Sea, &c. be heard and adjudged in such Shires as the King by Commission shall appoint, in like Form, &c. as if committed on Land. *ib.* And excludes Clergy. *ib.* Confined to Offences which would be Felony on shore. *ib.*

Admirals' Jurisdiction not thereby ousted by Stat. 11 & 12 W. 3. c. 7. *ib.*

Trials of Principals also regulated by Stats. 4 Geo. 1. c. 11. 8 Geo. 1. c. 24. 18 Geo. 2. c. 30. and 32 G. 2. c. 25. *ib.*

Trial of Accessaries regulated by Stat. 11 & 12 W. 3. c. 7. s. 10. and 8 Geo. 1. c. 24. s. 3. § 14.

Clergy. - - - - - - - - - § 15.

Ousted from Piracy by Stat. 28 H. 8. c. 15. and subsequent Statutes.

Stat. 39 Geo. 3. c. 37. declares that all Offences committed on the Sea are of the same Nature and liable to the same Punishment as if done on Shore; and shall be tried according to Stat. 28 H. 8. *ib.*

Regulations for holding at least two Sessions of Admiralty in the Year at the O. B. by Stat. 32 Geo. 2. c. 25. - - - - - - - - - § 16.

Power to Commissioners and Justices of Peace to bind Witnesses over to prosecute and give Evidence, &c. *ib.*

Finding the Bill. *ib.* Standing mute. *ib.*

Form of Judgment. *ib.* Forfeiture. *ib.*

Piracy.

§ 1. *Special jurisdiction.*

BY the civil law, the punishment of piracy was capital; of which the admiral took cognisance: but it does not fall within the scope of this work to consider the offence otherwise than as it is a *marine* felony, triable under the King's special commission by virtue of the stat. 28 H. 8. c. 15. since followed by other statutes, which proceeds according to the course of the common law; and in which commission two common law Judges are constantly included, by whom in effect the prisoners are tried, though the Judge of the Admiralty still presides.

13 Co. 54.

4 Inst. 147.

2 Hale, 17.

4 Blac. Com. 269.

I shall postpone for the present the consideration of the stat. of H. 8. together with the subsequent statutes relating to the trial of this offence, till I come regularly to speak of that branch of the subject; remarking by the way what Lord Hale observes, that besides the commission founded on the first-mentioned statute, there had then been for a century past in the same commissions common law commissions of oyer and terminer, gaol delivery, and of the peace, for all offences against any penal laws, super mare vel infra fluxum maris ad plenitudinem maris; and also of all treasons, murders, &c. super

Post. s. 13.

2 Hale, 18.

super mare vel in aliquo rivo, portu, aquâ dulci, crecâ, seu infra fluxum maris ad plenitudinem maris, a quibuscunque primis pontibus versus mare, et super littus maris, &c. secundum stylum et consuetudinem regni Angliæ et Curiæ Admiralitatis: and limiting the county of their session and inquiry.

Ch. XVII. § 1. *Special jurisdiction.*

§ 2. *Form of commission.*

The commission under which such sessions of admiralty are holden has existed in nearly the same form for a considerable period, with the insertion only from time to time of a general reference to such statutes as have been made for the regulation of this tribunal. It begins by reciting the statutes of the 28 H. 8. c. 15. and 27 H. 8. c. 4.; and then appoints certain persons, amongst others before-mentioned, to be of the quorum, to inquire concerning all treasons, piracies, felonies, robberies, murders, and conspiracies done or committed upon the sea, or in any river, haven, creek, or place, where the admiral has, or pretends to have any power, authority, or jurisdiction; and also concerning other misdemeanors, offences, and injuries whatsoever committed against the form of the said recited statutes of H. 8. or against the form of the 11 & 12 W. 3. c. 7. 4 G. 1. c. 11. 1 Ann. st. 2. c. 9. 12 Ann. st. 2. c. 18. 11 G. 1. c. 29. 8 G. 1. c. 24. 1 G. 2. st. 2. c. 25. 5 Eliz. c. 5. s. 30. 13 G. 2. c. 4. 17 G. 2. c. 24. 18 G. 2. c. 30. or 29 G. 2. c. 34. (*a*) and to hear and determine all the said treasons and other the premises, and to make gaol delivery, according to the laws and customs of Great Britain, and the statutes aforesaid; and also to inquire of all other crimes and offences whatsoever, and accessaries thereto whomsoever or howsoever had, done or committed, upon the high sea, or in any haven, river, creek, or place where the admiral has or pretends to have power, authority, or jurisdiction; and to hear and determine all such crimes and offences, according to the laws and customs of Great Britain, and the statutes aforesaid, or other statutes in that behalf made; as by the laws and statutes of the kingdom, may or ought to be heard, or determined by any commissioners or justices appointed by the crown. It then commands the quorum commissioners, or one of them, to make inquiry concerning the premises, and to hear and determine

(*a*) And *vide* st. 32 G. 2. c. 25. and 39 G. 3. c. 37.

the

Ch. XVII. § 2. *Commission under* st. 28 H. 8. c. 15.

the same, and to do and perform all things to be done thereupon, as appertains to justice, according to the laws and customs of the kingdom, and the statutes aforesaid, or other statutes in that behalf made: and then concludes with the command to all sheriffs, &c. in the usual form of the commission of oyer and terminer.

I shall now consider,

1. *What is Piracy.*
2. *Of the Place where the Fact is committed.*
3. *Of Principals and Accessaries.*
4. *Of the Indictment and Evidence.*
5. *Of the Trial and Judgment.*

§ 3. *What is piracy.* Co. Lit. 391. 4 Blac. Com. 72. 2 MS. Sum. 285. 3 Inst. 112. 1 Hawk. ch. 37. s. 6. 8. 10. 1 Hale, 354. 2 Hale, 18. 1 Rol. R. 175. Moor, 756. Post. 3 Inst. 112. Rex v. Morphes, Salk. 85. *Sed vide* Co. Lit. 391. 1 Hale, 355. 2 Hale, 12, &c. Fost. 226. Rex v. May, Bishop, and others, Nov. 1696. MS. Tracy, 77.

The offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. But it is no felony at common law, being out of its jurisdiction; and before the statute 28 H. 8. c. 15. it was only punishable by the civil law. That statute, however, does not alter the nature of the offence in this respect; and therefore a pardon of all felonies generally does not extend to it: nor does the offence extend to corruption of blood; at least where the conviction is before the admiralty jurisdiction; though the contrary is holden by considerable authority upon attainder before commissioners under the stat. of H. 8.

Several mariners on board a ship called King Charles the Second, lying near the Groyne, seized the captain, he not agreeing with them, and after putting him on shore, carried away the ship, and afterwards committed several piracies. This force upon the captain, and carrying the ship away, (which was explained by their use of it afterwards), was adjudged piracy; and they were executed.

Mason's case, O. B. 9 G. 1. on a special commission. 8 Mod. 74.

But where the master of a vessel loaded goods on board at Rotterdam, consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England, the ship was burned, when he protested both the ship and cargo as burned with intent to defraud the owners and insurers; the judges of the common law, who assisted the judge of the admiralty, directed an acquittal upon an indictment

ment for piracy and stealing the goods; because being only a breach of trust and no felony, it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined.

Ch. XVII. § 3. *What is piracy.*

§ 4.

When states are in open hostilities, the plundering of an enemy is not piracy, but lawful capture. And before the stat. 11 & 12 Wm. 3. c. 7. which was levelled against commissions granted by James 2. after his abdication, none were deemed pirates who acted under the commission of any foreign power. But that statute enacts that "if any of his "Majesty's natural born subjects or denizens of this king- "dom, shall commit any piracy or robbery, or an act of "hostility against others his Majesty's subjects, upon the "sea, under colour of any commission from any foreign "prince or state, or pretence of authority from any person "whatsoever; every such offender shall be deemed, ad- "judged, and taken to be a pirate, felon, and robber, and "being duly convicted thereof, according to this act, or "that of Hen. 8. shall suffer death, and loss of lands, goods, "and chattels, as pirates, &c. upon the seas ought to "suffer."

2 MS. Sum. 285. 289. 3 Bulstr. 28. 4 Inst. 154. 1 Hawk. ch. 37. s. 10. R. v. Golding and others, 8 St. Tr. 73. Vaughan's case, Salk. 635. 5 St. Tr. 24. 11 & 12 W. 3. c. 7. s. 8 made perpetual by 6 G. 1. c. 19. *Acting under commission of a foreign state.* Post.

§ 5.

In addition to which, the statute 18 Geo. 2. c. 30. enacts, "That all natural born subjects or denizens, who du- "ring any war shall commit any hostilities upon the sea; "or in any haven, river, creek, or place, where the admiral, "&c. has power, authority, or jurisdiction, against his Ma- "jesty's subjects, by virtue or under colour of any commis- "sion from any his Majesty's enemies, or shall be any "otherwise adherent, or giving aid or comfort to his Ma- "jesty's enemies upon the sea, or any haven or places where "the admiral has jurisdiction as aforesaid, may be tried as "pirates, felons, and robbers, in the said court of admiralty, "on ship-board or on the land, in the same manner as per- "sons guilty of piracy, felony, and robbery, are by the "said acts directed to be tried; and such persons being "upon such trial convicted thereof, shall suffer death, loss "of lands, &c. as any other pirates, felons, and robbers "ought by virtue of the statute of the 11 W. 3. or any "other act, to suffer." With a proviso (s. 2.), "That any "person

18 G. 2. c. 30. *Piracy committed under enemy's commission.*

Proviso, against subsequent trial for high treason.

Ch. XVII. §5. *What is such.*

" person who shall be tried and acquitted, or convicted, ac- " cording to this act, for any of the said crimes, shall not " be liable to be indicted, prosecuted, or tried again for the " same crime or fact, as high treason." But this act shall not (by s. 3.) prevent any offender, who shall not be tried according thereto, from being tried for high treason, within this realm, according to the stat. 28 H. 8. c. 15.

Post. s. 13.

Joseph Evans's case, MS. Gould J.

Adhering to the King's enemies in hostilely cruising in their ships triable as piracy.

On the first day of Michaelmas term 1782, at a meeting of all the Judges at Serjeant's Inn, Lord C. B. Skynner stated to them an indictment, on which a man was convicted before him at the late session of Admiralty, founded on the stat. 18 Geo. 2., whereby treasons on the high seas in time of war, by adhering to the King's enemies, are to be tried in like manner as piracies, &c. The indictment, after setting forth that there was a war between England and France, charged that the prisoner did adhere to the King's enemies; and in prosecution of such adherence did, in a certain armed vessel called the Escamatour, with certain persons unknown, hostilely go a cruising, with intent in maritime places to seize and take the ships, goods, &c. of our sovereign lord the King and his subjects. A difficulty first occurred, whether the overt act were sufficiently charged; for it was said that it stood in an equivocal light, whether the intent might not be to commit acts of piracy: but Lord Loughborough observing that it was laid to take ships of the King, as well as of the subjects, it made it clear that it was an adherence to the enemy; in which opinion all concurred. In this respect it was compared to laying as an overt act of compassing the King's death, that the prisoners conspired or agreed to seize the King's guards. But the principal doubt was as to the legality of the trial: as to which the case stands thus: the statute of the 28 H. 8. c. 15. expressly includes treasons. The 11 & 12 W. 3. c. 7. had in view, principally at least, the trial of pirates, robbers, and felons on the sea, &c. near his Majesty's colonies, or in remote places; omitting *treason* as a general term; and provides that they may be tried by commissions of admiralty directed by that act. The 8th section directs, that *subjects committing hostilities against other subjects, under colour of a commission from any foreign prince*, &c. shall be deemed pirates, felons, and robbers, and may be tried according to that act, or the statute of

Allegation of a cruising against the King's ships, as well as those of the subjects, shews the intent to be traitorous, and not merely piratical.

of H. 8.: but this is restrained, except as to that particular species of adherence, to piracies, robberies, and felonies, in their ordinary acceptation. By s. 14. the commissioners under the statute of H. 8. or that act, may issue warrants to apprehend pirates, felons, or robbers, or their acoessaries, being within any of the colonies, &c. in order to be brought to trial in any plantation in America, *according to that act* of Will., or to be sent to England to be tried there. Then the stat. 18 Geo. 2. reciting the doubt whether subjects entering into the service of the King's enemies, on board privateers and other ships having commissions from France and Spain, and having by such adherence been guilty of high treason, can be deemed guilty of felony within the meaning of the act of King William, and be triable by the court of Admiralty appointed by virtue of the said act; in the enacting part, after particularizing that specific adherence, adds, *or shall be any otherwise adherent*, may be tried *as pirates, felons, and robbers*, by the said court of Admiralty, &c. concluding with the provisoes before-mentioned.

Ch. XVII. § 5. *What is such.*

(Not saying "shall be deemed pirates," as in st. 11 & 12 W. 3. c. 7. s. 8.)

At a subsequent meeting of the Judges, at which were present Lord Loughborough, Lord C. B. Skynner, Gould J., Willes J., Ashhurst J., Eyre B., Perryn B., and Heath J., it was agreed that the prisoner had been well tried under the usual commission under the stat. 28 H. 8. For that taking the two statutes of 11 & 12 W. 3. and 18 Geo. 2. together, and the doubt raised in the latter, whether the two instances of high treason mentioned in the statute of William, and in the preamble of the act of George, could be tried as piracy, and according to that statute, as being high treason [and yet the act of King William had particularly declared that they might, and that the offenders therein specified should be deemed pirates;] and then enacting, that in those two instances, and also that in case of any other adhering to the King's enemies, the parties might be tried as pirates by the court of Admiralty, according to that statute; it was substantially declaring that they should be deemed pirates; and that it was a just construction in their favour to allow them to be tried *as such* by a jury.

Wednesday, Nov. 11, 1782.

By sect. 9. of the above statute of W. 3. it is further enacted, that "if any commander or master of any ship, or "any

§ 6. 11 & 12 W. 3. c. 7. s. 9.

Ch. XVII. § 6. *What is such.*

"any seaman or mariner, shall, in any place where the "admiral hath jurisdiction, betray his trust, and turn pi- "rate, enemy, or rebel; and piratically and feloniously run "away with his or their ship or ships, or any barge, boat, "ordnance, ammunition, goods, or merchandise; or yield "them up voluntarily to any pirate; or shall bring any se- "ducing message from any pirate, enemy, or rebel; or "consult, combine, or confederate with, or attempt or en- "deavour to corrupt any commander, master, officer, or "mariner, to yield up or run away with any ship, goods, "or merchandises, or turn pirates, or go over to pirates; or "if any person shall lay violent hands on his commander, "whereby to hinder him from fighting in defence of his "ship and goods committed to his trust (*a*); or shall con- "fine his master; or make or endeavour to make a revolt "in the ship; he shall be adjudged, deemed and taken to "be a pirate, felon, and robber; and being convicted there- "of according to the directions of this act, shall suffer "death and loss of lands, goods, and chattels as pirates, "felons, and robbers upon the seas ought to suffer."

Made perpetual by stat. 6. G. 1. c. 19.

Seamen, &c. running away with ship or cargo, &c. Vide Mason's case, 8 Mod. 74.

Yielding voluntarily to pirates.

Confederating with them.

Attempting to corrupt crew, &c.

Putting force on commander.

Stirring revolt.

Post.

A reward is given to the discoverer of any combination for running away with the ship.

(*a*) This last provision follows verbatim a similar one in the stat. 22 & 23 Car. 2. c. 11. s. 9. which enacts generally that such an offender shall suffer death as a felon; without specifying how he shall be tried. And by the same act, s. 2. where goods shall be laden on board any English ship of 200 tons and upwards, and mounted with 16 guns or more, if the master shall yield up such goods to any Turkish ships or vessels, or to any pirates, or sea rovers whatsoever, without fighting; on proof thereof in the High Court of Admiralty, he shall be incapable of taking charge of any English ship as master or commander; and if he do, he shall be imprisoned by warrant from the said court for six months for every such offence. And in case the person so taking the said goods shall release, &c. the ship, shall pay to the master any money or goods in lieu thereof for freight or other reward or gift; the said goods or money so given, or the value thereof, as also the master's part of the ship, &c. so released, &c. out of which the said goods were taken, shall be liable to repair the owners of the goods so delivered or taken by action in the said court; and the damages to be recovered in the manner there stated. By s. 4. if the ship be of less burthen or force, and the master shall yield it to such persons not having at least his double number of guns, without fighting, he shall be liable to all the penalties in the act. By s. 7. mariners declining or refusing to fight and defend the ship when so commanded by the master, or uttering any words to discourage other mariners from doing so, and found guilty thereof, shall lose all their wages due, and all goods which they have on board the ship, and suffer imprisonment not exceeding six months, and be kept to hard labour during such imprisonment. Also by that and stat. 8 G. 1. c. 24. certain benefits are held out to the master and mariners to resist pirates.

By

Ch. XVII. § 7. *What is such.*

§ 7. 8 G. 1. c. 24. made perpetual by 2 G. 2. c. 28. s. 7. *Trading or corresponding, &c. with pirates.*

By stat. 8 Geo. 1. c. 24. s. 1. "If any commander or master "of any ship or vessel, or any other person, shall anywise "trade with any pirate, by truck, barter, exchange, or in "any other manner, or shall furnish any pirate, felon, or "robber upon the seas with any ammunition, provision, or "stores of any kind; or shall fit out any ship or vessel "knowingly and with a design to trade with or supply or "correspond with any pirate, felon, or robber on the seas; "or if any person shall anywise consult, combine, confe- "derate, or correspond with any pirate, felon, or robber on "the seas, knowing him to be guilty of any such piracy, "felony, or robbery; every such offender shall be deemed "and adjudged guilty of piracy, felony, and robbery: and "being convicted shall suffer death (by s. 4. without bene- "fit of clergy) and loss of lands, goods, and chattels, as pi- "rates upon the seas." And the offenders shall be tried according to the stat. 28 H. 8. and 11 & 12 W. 3. By s. 2. every vessel so fitted out to trade, &c. with pirates, and the goods, shall be forfeited, half to the crown and half to the informer.

§ 8. *Forcibly entering merchant ships, and destroying goods.* 8 G. 1. c. 24. s. 1.

And by the same act, 8 Geo. 1. (s. 1.) "In case any "person or persons belonging to any ship or vessel whatso- "ever, upon meeting any merchant ship or vessel on the "high seas, or in any port, haven, or creek whatsoever, shall "forcibly board or enter into such ship or vessel, and though "they do not seize or carry off such ship or vessel, shall "throw overboard, or destroy any part of the goods or "merchandises belonging to such ship or vessel; the person "or persons guilty thereof shall in all respects be deemed "and punished as pirates as aforesaid."

The burning or destroying of ships, against which provision is made by the stat. 1 Ann. st. 2. c. 9. and other acts, will be considered hereafter. *Vide* tit. Malicious Mischief.

§ 9. 32 G. 2. c. 25. *Illegal ransoming of neutral vessels made prize.*

And by stat. 32 Geo. 2. c. 25. s. 12. (*a*) "In case any com- "mander or commanders of any private ship or vessel of war, "duly commissioned by virtue of the stat. 29 Geo. 2. c. 34. "or this act, shall agree with the commander or other per- "son of or belonging to any neutral or other ship or vessel

(*a*) This act was only to continue in force during the then war with France. The same clauses were re-enacted by st. 2 G. 3. c. 16. to continue during the then war with Spain. But *Qu.* Whether still continuing, though retained in the subsequent edition of the Statutes?

Ch. XVII. § 9. *What is such.*

" (except those of his majesty's declared enemies), for the " ransom of any such neutral or other ship or vessel, or the " cargo or any part thereof, after the same has been taken " as a prize; and shall, in pursuance of any such agreement " or agreements, actually quit, set at liberty, or discharge " any such prize, instead of bringing the same into some " port of his majesty's dominions; that then every such com- " mander of any such private ship or vessel of war, who shall " so agree for such ransom, (except as aforesaid,) and shall " quit, set at liberty, or discharge any such prize in manner " aforesaid, shall be deemed and adjudged guilty of piracy, " felony, and robbery; and being duly convicted thereof in " manner before mentioned, shall suffer death, loss of lands, " &c. as pirates, felons, and robbers upon the seas ought to " suffer according to the laws now in being." Provided (s. 13.) " That it shall be lawful for the commander of any private " ship of war upon the capture of any neutral vessel, which " by any law or treaty shall be liable only to the forfeiture " of such contraband goods as shall be on board thereof, to " receive such goods from such vessel, in case the com- " mander thereof is willing to deliver them; and the com- " mander of such private ship of war may thereupon quit, " set at liberty, or discharge such neutral vessel" (*a*), &c. " and if any person shall purloin or embezzle any such " contraband goods before condemnation thereof, he shall " be subject to such pains and forfeitures as are inflicted by " law upon persons purloining or embezzling goods out of " any captured ship."

Vi. st. 17 (& 29) G. 2. c. 34. s. 11. giving the treble value of the goods so embezzled by any officer, seaman, &c.

2. *As to the Place where the Fact is committed.*

§ 10. *As to the place.* 2 Hale, 13, &c. *Vide* post. s. 12.

Lord Hale says, that before the latter end of the reign of Edw. 3. the court of K. B. not only had, but exercised, a concurrent jurisdiction with the Admiralty over felonies committed upon the narrow seas, and on the coast, though on

(*a*) By the stat. 22 G. 3. c. 25. and 33 G. 3. c. 66. s. 37, &c. " it shall " not be lawful for any subject to ransom or to enter into any contract or " agreement for ransoming any ship or vessel belonging to any subject of " his majesty, or any merchandise or goods on board the same, which " shall be captured by the subjects of any state at war with his majesty, " or by any persons committing hostilities against his majesty's subjects." Sect. 2. of the first act and s. 38. of the last avoid all such contracts and securities given for the same; and s. 3. of the one and 39. of the other inflict a penalty of 500*l.* on any person entering into such contract, to be recovered by action of debt by the informer. This latter act expired with the late war with France.

the

the high sea, being considered within the realm of England, though out of the bodies of counties: and the fact was presented and tried by men of the adjacent counties. But it is agreed on all hands that the admiral never had jurisdiction in any river, creek, or port within the body of a county: and that the stat. of the 28 H. 8. c. 15. extends not to offences done in such places; because they are and always were cognizable by the common law. And the words of that statute, "where the admiral *pretends* to have power," &c. are not to be extended to such a pretence as is without any right at all: and the first statute which gave the admiral concurrent jurisdiction in any river or creek within the land was the 15 Ric. 2. c. 3. concerning the death or mayhem of a man; which has been considered in another place.

Ch. XVII. § 10. *As to place.*

1 Hawk. ch. 37. s. 11.
2 Hale, 15, 16.
4 Inst. 137.

Ante, tit. Homicide, s. 132. p. 368.

But it seems that the only question of jurisdiction generally considered at this day upon the statute 28 H. 8. c. 15. is, Whether the fact happened at any place within the body of a county? in which case the trial must be had before the ordinary jurisdiction; for then it does not fall within the mischief or purview of the act. And the stat. 11 & 12 W. 3. c. 7. and 32 Geo. 2. c. 25. seem to be legislative interpretations of the first mentioned statute, being passed in pari materiâ and with reference to it: and these last are confined to *any place where the admiral has jurisdiction;* which as I have before shewn cannot be within the body of a county, unless by positive statute.

Vide 1 Hawk. ch. 37. s. 11.

3 Inst. 113.

4 Inst. 137.

The only difficulty which ever occurs is with respect to what shall be considered as the line of demarcation between the county and the high sea. Upon the open sea-shore it is past dispute that the common law and the admiralty have alternate jurisdiction between high and low water mark. But in harbours or below the bridges in great rivers near the sea, which are partly inclosed by the land, the question is often more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain that the admiral can have no jurisdiction in any rivers or arms or creeks of the sea within the bodies of counties, though within the flux and reflux of the tide: except in the particular instances before shewn, of mayhem and homicide done in great rivers beneath the bridges near the sea; which depend on the stat. 15 Ric. 2. c. 3.

2 Hale, 17.
3 Inst. 113.
2 Hawk. ch. 9. s. 14.
1 Bac. Abr. 751.
Vide Rex v. Solegard, Andr. 232.

3 Inst. 113.
1 Hawk. ch. 37. s. 11.

Ch. XVII. § 10. *As to place.*

c. 3. In general, it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties, *where persons can see from one side to the other.* Ld. Hale, in his treatise De Jure Maris, says, "That arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably* discern between shore and shore, is, or at least may be, within the body of a county." Hawkins, however, considers the line more accurately confined by other authorities to such parts of the sea where a man standing on the side of the land *may see what is done on the other*, and the reason assigned by Lord Coke in the Admiralty case in support of the county coroner's jurisdiction, where a man is killed in such places, *because that the county may well know it*, seems rather to support the more limited construction. But, at least where there is any doubt, the jurisdiction of the common law ought to have the preference.

2 Hale, 16. 54. 4 Inst. 141. 13 Co. 52. Hargrave's Tracts, p. 10. 2 Hawk. ch. 9. s. 14. 13 Co. 52. 2 Roll. Abr. 169. 8 Ed. 2. coron. 399. 4 Inst. 140. 12 Co. 81.

3. *Of Principals and Accessaries.*

§ 11. *Principals and accessaries.*

As piracy was no felony by the common law, nor made so generally by any statute, whereby all those would incidentally have been made accessaries in the like cases in which they would have been such at common law; and as they were neither included by express words nor by construction in the stat. 23 H. 8. c. 15. they remained as they were before triable by the civil law only if their offence were committed on the sea; but if on the land, by no law till the stat. 11 & 12 W. 3. c. 7. By sect. 10. of which it is enacted, "That every person whatsoever who shall either on "the land or on the seas, knowingly or wittingly, set forth any "pirate; or aid and assist, or maintain, procure, command, "counsel, or advise any person or persons to do or commit "any piracies or robberies upon the seas; and such person "or persons shall thereupon do or commit any such piracy "or robbery; then every such person shall be and are here- "by declared and shall be deemed and adjudged to be ac- "cessary to such piracy and robbery done and committed. "And further, that after any piracy or robbery is or shall "be committed by any pirate or robber whatsoever, every "person and persons who, knowing that such pirate or "robber has done or committed such piracy and robbery, "shall on land or upon sea receive, entertain, or conceal "any such pirate or robber; or receive or take into his "custody

1 Hawk. ch. 37. s. 7. Sum. 77. 3 Inst. 112. 2 Hale, 17. *Vide* MS. Sum. 449. 11 & 12 W. 3. c. 7. s. 10.

"custody any ship, vessel, goods, or chattels which have Ch. XVII. § 11.
"been by any such pirate or robber piratically and feloni- *Principals and accessaries.*
"ously taken; shall be and are hereby likewise declared,
"deemed, and adjudged to be accessaries to such piracy and
"robbery." And then it directs, that "all such accessaries
"shall be inquired of, tried, &c. and adjudged after the course
"of the common law, according to the stat. 28 H. 8. as the
"principals of such piracies and robberies may and ought to
"be, and no otherwise: and being thereupon attainted shall
"suffer death and loss of lands, goods, and chattels, in like
"manner as such principals, according to the stat. 28 H. 8.
"which is thereby declared to continue in full force."

But all persons made accessaries by this statute are by the stat. 8 Geo. 1. c. 24. declared to be principal pirates, felons, and robbers, and are to be tried as such accordingly. 8 G. 1. c. 24. *Vide* post. s. 14.

4. *Of the Indictment and Evidence.*

§ 12.

The indictment for this offence must allege the fact upon the sea to have been committed within the jurisdiction of the Admiralty, and lay it to be done feloniously and piratically. And if it turn out that the goods were taken any where within the body of a county, the commissioners under the statute of Hen. 8. can have no jurisdiction to inquire of it. As, on the other hand, if the goods were taken at sea, and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried: because the original felony was no taking whereof the common law takes cognizance. Lord Hale indeed thinks that an indictment of piracy before such commissioners may be formed as an indictment of robbery at common law, namely, vi et armis et felonice, &c.; for that piracy upon the statute is robbery; and that offenders have been indicted, convicted, and executed for it in the King's Bench as for a robbery. But however this might have been formerly, there appears to be no instance of any such proceeding for several centuries: and the boundary line between the two jurisdictions seems now sufficiently settled in the manner before described.

Indictment and evidence.
1 Hawk. ch. 37. s. 6. 10.
3 Inst. 113.
1 Hale, 355.
2 Hale, 12, &c.
Ante, 802.

5. *Of*

Ch. XVII. § 13. *Trial and judgment.*

5. *Of the Trial and Judgment.*

§ 13. Stat. 28 H. 8. c. 15. *Vide* 35 H. 8. c. 2. For the trial of foreign treasons, ante, p. 103.

By the stat. 28 H. 8. c. 15. it is enacted, "That all treasons, felonies, robberies, murders, and confederacies committed in or upon the sea, or in any other haven, river, creek, or place, where the admiral has or pretends to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm as shall be limited by the king's commission or commissions to be directed for the same in like form and condition as if any such offences had been committed or done in or upon the land. And such commissions shall be had under the great seal, directed to the admiral or his lieutenant, deputy and deputies, and to three or four such other substantial persons as shall be named or appointed by the Lord Chancellor of England, to hear and determine such offences after the common course of the law of this realm used for treasons, felonies, murders, robberies, &c. done and committed upon the land within this realm."

Ante, p. 794.

How the court is constituted I have before shewn. And by section 2. "such persons to whom such commission shall be directed, or four of them at least, shall have full power and authority to inquire of such offences by the oaths of 12 good and lawful inhabitants in the shire limited in their commission in such like manner and form as if such offences had been committed upon the land within the same shire. And that every indictment found and presented before such commissioners for any treasons, felonies, robberies, murders, manslaughters, or such other offences, being committed upon the seas or in any other haven, river, or creek, shall be good and effectual in law. And if any person happen to be indicted for any such offence done upon the seas or in any other place above limited, that then such order, process, judgment, and execution shall be had, &c. as against traitors, felons, &c. for treason, felony, &c. done upon the land, as by law is accustomed. And that the trial of such offences, if denied by the offenders, shall be had by 12 lawful men inhabiting in the shire within such commission which shall be directed as aforesaid. And no challenge to be had

" had for the hundred. And such as shall be convict of " any such offence by verdict, confession, or process by au- " thority of any such commission, shall have and suffer such " pains of death, loss of lands, goods, and chattels as if " they had been attainted and convicted of such offence done " upon the land, and (by s. 3.) shall be excluded from the " benefit of clergy." Ch. XVII. § 13. *Trial and judgment.*

At a session of Admiralty under a commission by virtue of the stat. 28 H. 8. c. 15. Snape and Aires had two indictments found against them; one was general, for maliciously burning a ship called the Cloudesly Galley; which was done to defraud the insurers: and this the civilians said was a capital offence by their law: the other indictment was founded upon the stat. 22 & 23 Car. 2. c. 11. which makes such offence felony; but does not direct how it shall be tried. But Tracy and Powell Js., who were present, doubted if either of the indictments could be tried by the commissioners: and upon a subsequent conference of the Judges, met to consider this matter, Holt C. J. Ward C. B. and others were of opinion, as to the first indictment, that the stat. 28 H. 8. c. 15. extends only to such offences as would be felony if committed upon land. Powell J. was of a different opinion, to which Tracy J. inclined. Upon the other indictment Holt C. J. and Tracy J. thought that this was triable under the commission, and that the stat. 28 H. 8. extended to the trial of an offence made felony by a subsequent statute: but the other Judges being of a different opinion, it was agreed that it was not proper to try the prisoners upon either of the indictments. The particular doubt, however, in that case is cleared up by the stat. 1 Ann. st. 2. c. 9. s. 4.; and to obviate the like doubt particular provision has been made in other statutes relative to the trial of other offences committed at sea. Rex v. Snape and Aires, Sess. after Trin. T. 1702. MS. Tracy, 78.

But doubts having arisen, Whether the stat. of Hen. 8. had not taken away the jurisdiction of the admiral in the trial of these offences? the stat. 11 & 12 W. 3. c. 7. s. 1. provides " that all piracies, felonies, and robberies commit- " ted in or upon the sea, or in any haven, river, creek, or " place where the admiral has jurisdiction, &c. may be exa- " mined, inquired of, tried, heard, and determined in any " place at sea or upon the land in any of his majesty's " islands, plantations, colonies, dominions, forts, or facto- " ries, *Vide* 2 Hale, 368. 11 & 12 W. 3. c. 7. s. 1. made perpetual by 6 G. 1. c. 19. This stat. directs in what manner courts of admiralty abroad authorized to try pirates shall be assembled and proceed.

Ch. XVII. § 13. *Trial and judgment.*

"ries, to be appointed for that purpose by the king's commission under the great seal, or the seal of the Admiralty, "directed to any of the admirals, &c. and such other persons as his majesty shall think fit, who shall have power "jointly or severally to commit, by warrant under the hand "and seal of them or any one of them, to safe custody, any "person against whom information of piracy, robbery, or "felony upon the sea shall be given upon oath: (which oath "they or one of them shall have power and are required to "administer), and to call and assemble a court of Admiralty on shipboard or upon the land, as occasion may require, which court shall consist of seven persons at least." And they shall proceed in the trial of such offenders in manner as set forth in the statute; and s. 10. declares that the stat. 28 H. 8. c. 15. shall continue in full force, any thing in the present act contained to the contrary notwithstanding.

and *vide* Beawes Lex Merc. fo. 243. and Molloy, b. 1. c. 4. s. 12, 13. where captors of pirates may execute justice on them.

Vi. ante, s. 4. 6. 11 & 12 W. 3. c. 7. s. 8.

This was calculated to save the trouble, expence, and delay of bringing offenders from remote places abroad to be tried in England.

The same statute, after setting forth (s. 8.) that subjects committing piracies on other subjects under colour of foreign commissions shall be adjudged pirates, felons, and robbers; directs that on conviction according to the same act, or the said statute of Hen. 8. they shall suffer death and forfeiture of lands and goods. The same punishment is inflicted on all such as are directed to be adjudged pirates by the 9th section on conviction, according to the directions of the same act.

4 G. 1. c. 11. s. 7.

By stat. 4 Geo. 1. c. 11. s. 7. (*a*) "All and every person or "persons who shall commit any offence for which they ought "to be adjudged pirates, felons, and robbers by stat. 11 & "12 W. 3. may be tried and judged for every such offence "according to the form directed by the stat. 28 H. 8., and "shall be excluded from their clergy."

8 G. 1. c. 24. s. 1. made perpetual by 2 G. 2. c. 28. s. 7. Ante,

And again, such as are declared pirates by st. 8 G. 1. c. 24. s. 1. are directed to be "tried, &c. according to the stat. "28 H. 8. c. 11. and 11 & 12 W. 3. and being convicted shall "suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers on the seas ought to

(*a*) By s. 8. the act is not to extend to such as are convicted or attainted in Scotland; but by s. 9. it is to extend to all the King's dominions in America.

"suffer."

" suffer." And all offenders under the act are (by s. 4.) excluded clergy.

Trial and judgment.

By stat. 18 Geo. 2. c. 30. the offenders therein mentioned " may be tried as pirates, felons, and robbers in the said " court of Admiralty, on shipboard, or upon the land, in " the same manner as persons guilty of piracy, felony, and " robbery are by the stat. 11 & 12 W. 3. c. 7. directed to be " tried; and on conviction shall suffer death and loss of lands, " &c. as any other pirates, felons, and robbers ought to suffer " by virtue of the stat. 11 & 12 W. 3. or any other act."

18 Geo. 2. c. 30.
Ante, s. 5.

Those who were deemed pirates by the stat. 32 Geo. 2. c. 25. are on conviction to suffer death and loss of lands, goods, and chattels as pirates, &c. according to the laws then in being.

Ante, s. 9.

§ 14.

Trial of accessaries.

In regard to the trial of accessaries, the stat. 11 & 12 W. 3. c. 7. before referred to, after setting forth who should be adjudged accessaries to piracy, enacts, " That such accessaries shall and may be inquired of, tried, heard, determined, and adjudged, after the common course of the laws of this land, according to the stat. 28 H. 8. c. 15. as the principals of such piracies and robberies, may and ought to be, and no otherwise; and being thereupon attainted, shall suffer such pains of death, loss of lands, goods, and chattels, and in like manner as the principals of such piracies, robberies, and felonies ought to suffer, according to the said stat. 28 H. 8. which is hereby declared to be in full force; any thing in this act to the contrary notwithstanding." But the stat. 8 Geo. 1. c. 24. s. 3. reciting that " whereas there are some " defects in the laws for bringing persons who are accessaries to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy or " robbery is not or cannot be apprehended and brought to " justice; enacts, that all person or persons whatsoever who " by stat. 11 & 12 W. 3. are declared to be accessary or accessaries to any piracy or robbery therein mentioned, are " hereby declared to be principal pirates, felons, and robbers, and shall and may be inquired of, heard, determined, and adjudged in the same manner as persons " guilty of piracy and robbery may, according to that statute, and being thereupon attainted and convicted, shall

11 & 12 W. 3. c. 7. s. 10.
Ante, s. 11.

8 G. 1. c. 24. s. 3.

Accessaries may be tried as principals.

Ch. XVII. § 14. *Trial and judgment.*

" suffer death and loss of lands, &c. in like manner as pi-
" rates and robbers ought by the said act to suffer." And by s. 4. " all such offenders are excluded the benefit of " clergy."

Scadding's case, M. 6 Jac. 1. Yelv. 134. and vide Cro. Eliz. 685.

On return to an habeas corpus, in the case of one Scadding, who had been committed to the Marshalsea by the court of Admiralty, the cause appeared to be for aiding and abetting one Exon, who was indicted for piracy, to escape out of prison; whereupon all the court held that though the fact were committed by Scadding within the body of the county, yet because it depended on the piracy committed by Exon, of which the temporal judges had no cognizance, and was as it were an accessorial offence to the first piracy, which was determinable by the admiral, they remanded the prisoner. And it was soon after fully settled in the Admiralty case, that one who knowingly receives and abets a pirate within the body of a county was not triable by the common law, the original offence being cognizable alone by another jurisdiction.

13 Co. 53.

§ 15. *Clergy.* 1 Hale, 664. 2 Hale, 369, 370. 3 Inst. 111.

Clergy being expressly taken away in case of piracy by the stat. 28 H. 8. c. 15. is not restored by the stat. 1 Ed. 6. c. 12. for no clergy was allowable for this offence at common law before the 1 H. 8. and consequently it is not touched by the stat. of Ed. 6.(*a*) But even if clergy were first taken away from it by stat. 28 H. 8. c. 15. yet as the stat. 1 Ed. 6. restores it only in " all other cases of *felony*," than those therein mentioned; and as piracy is not felony, nor noticed as such by the common law, the stat. 28 H. 8. still remains in force as to that offence: although in other respects as to felonies committed upon the high sea, in which clergy was restored by the stat. 1 Ed. 6. if committed upon the land, the party shall have the same benefit, though the proceeding be upon the statute 28 H. 8.; and therefore with regard to all other offences than piracy (which includes all acts made piracy by subsequent statutes, and thereby ousted of clergy),

(*a*) *Vide* 2 Hawk. ch. 33. s. 41. which distinguishes between such piracies as are committed on the high sea and those committed in creeks and rivers within the body of a county, the latter of which he thinks within the restoring clause of the stat. 1 Ed. 6. which distinction he intimates will reconcile 11 Rep. 31. b. with the other authorities.

triable

triable by the special commissioners under that statute, in as much as the marine law does not allow of clergy in any case, if it appeared upon the evidence that the fact would, if done upon land, have amounted to no more than felony within clergy, the practice till of late was for the Judges, in favour of life, to direct the jury to acquit the prisoner. But now this is otherwise ordered by the stat. 39 Geo. 3. c. 37. which, reciting the stat. 28 H. 8. c. 15., and the offences thereby directed to be tried under the King's commission, and that it would be "expedient to declare that other offences committed on the seas may be inquired of, tried, and determined, in like manner," "enacts and declares, that all "and every offence and offences, which after the passing of "the act (10th of May 1799) shall be committed upon the "high seas, out of the body of any county of this realm, "shall be, and are hereby declared to be offences of the "same nature respectively, and to be liable to the same pu-"nishments respectively, as if they had been committed "upon the shore; and shall be inquired of, heard, tried, "and determined and adjudged in the same manner as "treasons, felonies, murders, and confederacies are directed "to be by the same act."

Ch. XVII. § 15. *Clergy.*

Fost. 288. 2 MS. Sum. 294.

39 G. 3. c. 37.

Vide ante, 218. tit Homicide, s. 4.

§ 16. *Trial, when and where.* *Vide* ante, s. 9. note *a*

The stat. 32 Geo. 2. c. 25. s. 20. "for the more speedy bringing of offenders to justice," &c. enacts, that "a session "of oyer and terminer and gaol delivery for the trial of of-"fences committed upon the high seas, within the jurisdic-"tion of the Admiralty of England, shall be holden twice at "least in every year, viz. in March and October at the Old "Bailey, (except when the sessions of oyer and terminer and "gaol delivery for London and Middlesex shall be there "holden;) or in such other places in England as the lord "high admiral, &c. shall, in writing under his hand, directed "to the Judge of the court of Admiralty, appoint."

Commissioners and justices of peace to take informations of witnesses, and commit pirates. *Vide* ante, s. 9. note *a*.

By s. 21. any of the commissioners named for the time being, and every justice of peace within England, are empowered to take informations of witnesses in writing upon oath, touching any piracy, felony, or robbery done upon the sea, &c. or place where the admiral has jurisdiction; and, by warrant under his hand and seal, to cause the parties accused to be apprehended and committed to the gaol of the county

Ch. XVII. § 16. *Trial, &c.*

county or place where the information shall be taken, till discharged by due course of law. And by s. 22. such commissioner or justice may oblige every person, whom he shall judge necessary, to prosecute and give evidence against the party so committed, to enter into recognizance in a sufficient penalty to appear at the then next session of oyer and terminer and gaol delivery to be held for the jurisdiction of the admiralty of England, there to prosecute and give evidence &c.; and he may commit any person refusing to enter into such recognizance until such next sessions, or till he shall enter into such recognizance: and such recognizance shall be returned to the register of the court of Admiralty.

Finding bill.
4 Blac.Com.269.
3 Inst. 114.

In prosecutions of this sort, the indictment is first found by a grand jury of 12 men, and afterwards tried by another jury, as at common law. The stat. 28 H. 8. c. 15. and other statutes declare, that "the offence shall be heard and "determined after the common course of law used for fe- "lonies and robberies upon the land," and that there shall be no challenge for the want of hundredors.

Standing mute.
1 Hawk. ch. 37. s. 9.
3 Inst. 114.

It was settled that an offender standing mute on an arraignment under the statute 28 H. 8. should have judgment of pain, *forte et dure*, the offence being to be heard and determined *after the common course of the law*, &c. But now by

12 G. 3. c. 20.

the stat. 12 Geo. 3. c. 20. "if any person, being arraigned "on any indictment for piracy, shall, upon such arraign- "ment, stand mute, or will not directly answer to the pi- "racy, he shall be convicted of the same; and the court, "before whom he shall be so arraigned, shall thereupon "award judgment and execution against such person in the "same manner (and attended with the same consequences) "as if he had been convicted, by verdict or confession, of "such piracy." This, by s. 2., shall extend to the colonies

2 MS. Sum. 286.

and plantations in America. And such is the course of proceeding under the commission.

Form of judgment.
1 Hale, 100.
3 Inst. 113.
1 Hawk. ch. 37. s. 2.
Forfeiture.
Vide ante, s. 3.

Since the stat. of treasons 25 Ed. 3. the same judgment is given in piracy as in other cases of felony; though before that, it was (in the case of a subject,) to be drawn and hanged, as for petit treason. And a forfeiture is incurred of lands and goods.

CHAP. XVIII.

CHEATS.

Distinction between *Cheats* and *Larceny*. - § 1.

1. *Cheats at Common Law*. - - § 2.

Are either Frauds relating to some Matter of *public* Concern; or in regard to *private* Concerns, such as are effected by *Conspiracy*, *Forgery*, or *false Tokens*, calculated to deceive the Public in general. *ib.*

But defrauding one in a private contract, by falsely affirming a Thing to be of a superior Quantity or Quality than it is, not indictable. *ib.*

Nor giving the Party's own Order in Writing (of no Value) for Payment of Money: nor putting his own Mark on Goods: these resolving themselves into no more than his own Assertion. *ib.*

But cheating by means of false *public Tokens or Marks* indictable. - - - - § 3.

As by false Weights or Measures: selling Cloth marked with a counterfeit Alneager's Seal; or other known general Mark in the Trade. *ib.*

So playing with false Dice, &c.

So Cheats committed in *Matters of public Concern*. § 4.

As doing judicial Acts in the Names of others. *ib.*

Supplying Prisoners of War with unwholesome Food. *ib.*

Obtaining the King's Bounty, under Pretence of enlisting as a Soldier, by an Apprentice liable to be reclaimed by his Master. *ib.*

Private Cheats effected by *Conspiracy* or *Forgery* indictable. - - - - § 5.

As conspiring to suppress a Will; to read over a Deed wrongly which was about to be executed; to run a collusive

collusive Race to cheat a third Person; for pretending to be the one a Wine Merchant, the other a Broker, and bartering pretended Wine for other Goods. - - - - - - § 5.

Pretending to be and obtaining Credit as a Merchant by Means of *forged* Letters and Commissions. § 6.

But Forgery not indictable as a Cheat without actual Prejudice ensuing. *ib.*

II. *By Statute.* - - - - - - § 7.

1. By Stat. 33 H. 8. c. 1. falsely and deceitfully obtaining *Money*, *Goods*, &c. or other Things, by Colour and Means of any *privy Token* or *counterfeit Letter* in *other Men's Names*, &c. punishable by Imprisonment, Pillory, or other corporal Pain. *ib.*

What are to be defined *Tokens* within the Statute. *ib.*

2. By Stat. 30 Geo. 2. c. 24. Persons knowingly and designedly *by false Pretence* obtaining *Money*, *Goods*, &c. with Intent to cheat, deemed Offenders against Law and the public Peace, and on Conviction fined and imprisoned, or put in the Pillory, or publicly whipped, or transported for 7 Years. - § 8.

What are false *Pretences* within the Statute. *ib.*

Obtaining Money under false Pretence of sharing a supposed Bet before made, and which was to be decided the next Day. *ib.*

Or under Pretence of having been entrusted by one to take his Horses from Ireland to London, and detained till his Money was expended. *ib.*

Or under Pretence by one employed to keep an Account of Work done by others, and receive the Amount, that more Work had been done than really was, and delivering a surcharged Account accordingly; for the false Pretence created the Credit. *ib.*

So obtaining the Price of the Carriage of Goods under Pretence he had lost the Receipt for the Delivery of them. *ib.*

How far the Stats. of Hen. 8. and Geo. 2. vary from the common Law, or each other. - - § 9.

They are confined to obtaining *Money* or *Goods*. *ib.*

Q. As to *Choses in Action* since Stat. 2 G. 2. c. 25. § 9.

Stat. 33 H. 8. confined to *Tokens* and *Letters* in the Name of a *third* Person. Q. Whether 30 Geo. 2. so confined. *ib.*

Stat. 33 H. 8. extending to *privy* Tokens seems an Enlargement of the common Law, which required Tokens having Semblance of *public* Authenticity, and thereby calculated to deceive People in general. *ib.*

Yet general Authorities do not distinguish. *ib.*

Statutable Provisions against Frauds by particular Persons considered before. - - - § 10.

Frauds by Bankrupts postponed. *ib.*

South-Sea and other Bubbles, &c. *ib.*

Retailers having in Possession false Weights and Balances punishable summarily by Stat. 37 Geo. 3. c. 143. *ib.*

3. By Stat. 13 Eliz. c. 5. Parties to fraudulent Deeds, Alienations, Judgments, and Executions, shall, besides a Penalty to the Party grieved, suffer Imprisonment for half a Year on Conviction. - § 11.

Extended to Conveyances, &c. to deceive Purchasers by Stat. 27 Eliz. c. 4. *ib.*

4. By Stat. 9 Ann. c. 14. cheating at or with Dice, Cards, &c. liable to Forfeiture, Infamy, and corporal Punishment. - - - - - § 12.

III. *Form of Indictment.* - - - § 13.

Indictment at common Law, or on Stats. 33 H. 8. and 30 Geo. 2. must shew what false Tokens or Pretences were used, and aver that they were false, but no technical Form of Words is necessary. *ib.*

All present and concurring may be charged with the same Cheat. *ib.*

IV. *Punishment.* - - - - § 14.

At common Law, by Fine, Imprisonment, and other corporal Punishment. By Stat. 33 H. 8. c. 1. by corporal Punishment only. By Stat. 30 Geo. 2. c. 24. by Fine, corporal Punishment, or Transportation for 7 Years.

No Restitution of Goods in any Case.

Cheats.

§ 1. *Distinction between cheats and larceny.*

IN treating of the subject of Larceny in a prior chapter I had occasion to enter at large into the distinction between such fraudulent taking of the property of another as the law denominates *felonious*, and such as wanting that ingredient amounts only to misdemeanor. Upon reviewing the authorities there collected it will appear that the distinction so far as regards the subject of the present inquiry turns mainly upon the consideration whether or not the owner deceived by appearances intended to part with the absolute *property*, and not barely with the *possession* or *temporary use* of the thing at the time of the delivery, rather than upon any actual difference in the degree of fraud meditated by the taker, the intent in both instances being dishonestly to acquire and convert to his own use the property of another without any or an adequate consideration. If the absolute property were intended to be passed by the delivery, but such delivery were obtained by means of a *false token* or *pretence*, the case can only be reached in the first instance by a prosecution for a cheat either at common law or by help of the stat. 33 H. 8. after-mentioned, or in the instance of a false pretence by the stat. 30 G. 2. Where indeed the possession is honestly obtained upon a contract or trust in the first instance, the subsequent dishonest conversion of it, (except in cases where the privity of contract is determined) is no other than a breach of trust, for which the party injured has a civil remedy.

Vide ante, 665. 8.

Ante, 655.

Ante, 693.

Ante, 686—9.

Ante, 673.

The distinction above mentioned was particularly adverted to by Eyre B. in the debate on Pear's case in 1779, and seems to have been the ground of the resolution in Atkinson's case in the same year, and in Coleman's case in 1785, and in other cases classed with those.

§ 2. *Cheats at common law.*

It is not however every species of fraud or dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law; but in order to constitute it such, according to the doctrine in Wheatley's case, Young's case, and other authorities, it must be such as affects the public; such as is public in its nature, calculated

Rex v. Wheatley, 2 Burr. 1125. R. v. Young, 3 Term Rep. 104. 6 Mod. 42

calculated to defraud numbers, to deceive the people in general. And this is instanced not only by precedents of cheats effected by conspiracy, to which may be added forgery (*a*), which are in themselves substantive offences, though the cheats thereby intended be not fully carried into effect; but also, as it is stated generally, by such as are effected by means of false tokens. Yet these latter, being also put by way of example, must still, as it seems, be understood of such false tokens as affect the public at large, such as are calculated to defraud numbers, to deceive the people in general; of which the common instance referred to is the cheating by means of false weights and measures, against which it is said that ordinary care or prudence is not sufficient to guard. It does not distinctly appear that the instances so put in argument, of cheats effected by means of false tokens generally, were intended to be applied indiscriminately to offences at common law (*b*) as well as by statute; but such expressions seem rather to have been used concerning cheats in general which were the subject matter of an indictment, which would of course comprehend those included in the stat. 33 H. 8. And in R. v. Young and others, Buller J. distinguishing between cheats at common law and by statute, refers those which are effected by means of *false tokens* in general to the stat. 33 H. 8. to which it should seem from the express wording of the preamble and the necessary inference therefrom that they peculiarly belong. It may therefore be doubted whether the description given by Hawkins of this offence, that it consists in "deceitful practices in defrauding or *endeavouring* to "defraud another of his known right by means of some *artful* "*device* contrary to the plain rules of common honesty," be sufficiently accurate or distinct to be taken as a definition of

Ch. XVIII. § 2. *At common law.*

Vide post. s. 4. and several precedents of indictments for public cheats in Crown Circ. Comp. 75, &c.

Vide post. s. 9.

Vi. R. v. Wheatly, 2 Burr. 1127. 1 Hale, 506. R. v. Young and others, 3 T. Rep. 104.

Vi. post. s. 9.

Vide 1 Hawk. ch. 71. s. 1.

(*a*) *Vide* post. s. 6. and Crown Cir. Comp. 37. tit. Deceit; et ib. 78. and R. v. Baker, Trem. P. C. 96. and R. v. Saunders, ib. 100. R. v. Poulson, ib. 103. and R. v. Farmer, ib. 109.

(*b*) There is however a dictum in R. v. Wood, M. 24 Car. in Sty. 145. to this effect. It was an indictment for getting another's horse into his possession by using another man's name and *a false token*. It was objected, 1. that it was not laid contra statutum; but to this the Court answered that it was an offence at the common law. 2. That it did not shew what the false token was, nor in whose name it was used. It was not, however, quashed for those defects, but for another which Rolle C. J. took, viz. that it was only laid that the Defendant did the fact *nuper*. Little stress can be laid upon such an authority; for it is now clearly settled that the false token must be shewn. *Vide* also R. v. Wansbrough, Trem. P. C. 104. where there was merely a false affirmation. Et quære.

Ch. XVIII. § 2. *At common law.*

the offence at common law. I should rather say that it consists in the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public. But the offence is now enlarged by the statutes 33 H. 8. and 31 Geo. 2. after mentioned.

Wheatly's case, ante, 817.

In Wheatly's case the indictment, which was at common law, was against a brewer, for that he intending to deceive and defraud R. W. of his money, falsely fraudulently and deceitfully sold and delivered to him 16 gallons of amber for and as 18 gallons of the same liquor, and received 15*s.* as for the 18 gallons, knowing there were only 16 gallons. This the Court were clearly of opinion was not an indictable offence, but only a civil injury for which an action lay to recover damages (*a*). Lord Mansfield C. J. said, "it amounts only to an unfair dealing and an imposition on this particular man by which he could not have suffered but from his own carelessness in not measuring it; whereas fraud to be the object of criminal prosecution must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy."

MS. Dunning.

R. v. Channell, H. 1 G. 2. 2 Stra. 793. 1 Sess. Cas. 366. *Vide* Lawe v. King, 2 Saund. 81.

So where an indictment charged Channell for that he keeping a common grist mill, and being employed by W. B. to grind three bushels of wheat, did with force and arms unlawfully take and detain forty-two pounds weight of the wheat: upon demurrer(*b*) it was adjudged for the Defendant; there being no actual force laid; nor any charge of taking, as for unreasonable toll; but being a private matter for which trover would lie.

1 Hawk. ch. 71. s. 2. Pinkney's case, E. 6 G. 2. B. R. Masterman's Notes, and 1 Sess. Cas. 198. cited by Wilmot J. in 2 Burr. 1129.

It is equally clear that such a private cheat is not indictable, though it be accompanied by a false assertion to give it efficacy. As in Pinkney's case, where an indictment for selling a sack of corn at Rippon market, which the Defendant falsely affirmed to be a Winchester bushel, whereas it was greatly deficient, was quashed upon motion; being, as

(*a*) The same was ruled by Lord Raymond C. J. in R. v. Nicholson at the sittings M. 4 Geo. 2. upon an indictment for the Defendant's having delivered so many bushels less than he had contracted for, for which he said the party had his remedy by action. Masterman's notes.

R. v. Duffield, Sayer, 146. S.P.

(*b*) No stress can be laid on several cases to be found in the books, particularly in Mod. Reports, where similar indictments were refused to be quashed on motion, because it was the practice of the Court, as often declared, not to quash, on motion, indictments for offences founded in fraud or oppression, but leave the Defendants to plead. 5 Mod. 13. 6 Mod. 42. 12 Mod. 499.

the

the Court said, no more than telling a lie: or as where Lewis was indicted at common law for a cheat in depositing as a security for money advanced a quantity of gum, instead of and affirming it to be gum seneca, and afterwards selling the same to the prosecutor, and affirming it to be so, and to be worth 7*l.*, whereas it was worth but 3*l.* Judgment was arrested without cause shewn; being no more than a false affirmation, for which the party was not indictable unless he came with false tokens. Or where Jones obtained money of another, by pretending to come by the command of a third person to demand a debt or the like in his name; shewing no voucher or token for his authority; it was holden not indictable, for it was the party's own fault to trust him. So in Bryan's case, who obtained goods from a tradesman by pretending that she was sent by her mistress who was his customer.

Ch. XVIII. §2. *At common law.*

R. v. Lewis, E. 28 Geo. 2. MS. Dunning. *Vi.* Sayer. 205.

Jones's case, Salk. 379. and *vide* R. v. Gibbs, 1 East's Rep. 185.

Bryan's case, 2 Stra. 866. 2 Sess. Cas. 28.

Neither will the case differ if the Defendant make use of an apparent token, which in reality is upon the very face of it of no more credit than his own assertion. As where an indictment at common law charged that Lara, deceitfully intending by crafty means and devices to obtain possession of certain Lottery Tickets the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him Lara, &c. purporting to be a draft upon his banker for the amount, which he knew he had no authority to draw, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid; by virtue of which he obtained possession of the tickets, and defrauded the prosecutor of the value. Judgment was arrested, on the ground that the Defendant was not charged with having used any false token to accomplish the deceit; for the banker's check drawn by the Defendant himself entitled him to no more credit than his bare assertion that the money would be paid. Of the same nature was the case of Wilders, a brewer, who was indicted for a cheat in sending to one Hicks a publican so many vessels of ale marked as containing such a measure, and writing a letter to Hicks assuring him that they did contain that measure, when in fact they did not contain such measure, but so much less, &c. The indictment was quashed upon motion, as containing no criminal charge. Yet this

Rex v. Lara, 6 Term Rep. 565.

Rex v. Wilders, M. 6 G. 1. B. R. cited by Lord Mansfield in 2 Burr. 1128.

was

Ch. XVIII. §2. *At common law.*

was thought by the Court in Rex v. Wheatly a strong case; and Mr. Justice Foster doubted it, because he considered that the vessels, being marked as containing a greater quantity than they really did, were *false tokens*. Posssibly however the court in deciding the case of Wilders thought that those marks not having even the semblance of any public authority, but being merely the private marks of the dealer, did in effect resolve themselves into no more than the dealer's own affirmation that the vessels contained the quantity for which they were marked.

§ 3. *Using false public tokens.*

3 MS. Sum. 53.

R. v. Burgoyne, 1 Sid. 409.

But if in any of these cases the cheat be effected by means of false weights or measures, (which are known public tokens) it is then clearly indictable; for these betoken a general design to defraud; they are instruments or tokens purposely calculated for deceit, and by which the public in general may be imposed upon without any imputation of folly or negligence. This reasoning applies to all cases where any other species of false token having the semblance of public authenticity, is used. As in Edwards's case, where cloth was sold with the Alneager's seal counterfeited thereon: or as in Worrel's case, where there was a general seal or mark of the trade on cloth of a certain description and quality which was deceitfully counterfeited. If, said the Court in Pinkney's case before mentioned, the Defendant had measured the corn in a bushel, and had put any thing into the bushel to help to fill it up, or had measured it in a bushel short of the statute measure, it might have been indictable. Yet in Bowers's case (*a*) the knowingly exposing to sale and selling wrought gold under the sterling alloy as and for gold of the true standard weight, (which would be indictable in goldsmiths under the statute,) was holden not indictable at common law in the case of a common person, the sale not being by any false weight or measure (*b*). To the above-mentioned principle may also be referred the instances of cheats by means of playing with false dice, &c.; which is further punishable by penalties recoverable under the statute 16 Car. 2. c. 7. and 9 Ann. c. 14. by forfeiture of treble the value of the money or other thing won, to be recovered as the act directs.

R. v. Edwards, E. 35 Car. 2. Trem. P. C. 103.

Rex v. Worrel, ib. 106.

Pinkney's case, MS. ante, 818.

R. v. Bower, Cowp. 323.

(*Vi.* R. v. Bonny, Trem. P. C. 106.)

Maddock's case, 2 Roll. R. 107. S. P. Cro. Jac. 497. 2 Roll. Abr. 78.

(*a*) The sale there was by the servant of the Defendant: but the Court agreed that the master was responsible for the act of the servant done in the course of his employment, and within the scope of his authority.

(*b*) Qu. if false stamps or marks be used, such as are required by statute on plate of a certain alloy?

There

Ch. XVIII. § 4. *At common law.*

§ 4. *Cheats in matters of public concern.* Cro. Eliz. 531. 1 Mod. 46. T. Jones, 64. 1 Stra. 384. *Vide* tit. *False personating.* R. v. Blackburn, M. 36 Car. 2. Trem. P. C. 101. Cro. Cir. Comp. 78.

There is also another head of public cheats, indictable at common law, which are levelled against the public justice of the kingdom. Such as the doing judicial acts without authority in the name of another. But most of these are now made felony by the statutes 21 Jac. 1. c. 26. and 4 W. & M. c. 4. There is a precedent of an indictment against a married woman for pretending to be a widow, and as such executing a bail-bond to the sheriff for one arrested on a bailable writ. This perhaps was considered as a fraud upon a public officer in the course of justice.

So all frauds affecting the crown and the public at large are indictable, though arising out of a particular transaction or contract with the party. This was admitted by the very terms of the objection in the following case.

Treeve's case, Cornwall Sum. Ass. 1796. MS. Buller J. & MS. Jud. *Indictment lies for wilfully deceitfully and maliciously supplying prisoners of war with unwholesome food not fit to be eaten by man.*

The indictment charged that the Defendant Treeve, a common brewer, on 27th April, 35 Geo. 3. at, &c. knowingly wilfully deceitfully and maliciously did provide furnish and deliver to and for 800 French prisoners of war, whose names are unknown, and there being under the protection of the king, confined in a certain hospital called Eastwood hospital in the parish and county aforesaid divers large quantities, to wit, 500lb. weight of bread to be eaten as food by the said French prisoners of war, such bread being then and there made and baked in an unwholesome and insufficient manner, and then and there being made of and containing dirt, filth, and other pernicious and unwholesome materials and ingredients not fit to be eaten by man; and the said Defendant then and there well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of and to contain dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten as aforesaid; whereby the said prisoners of war did then and there eat of the said bread, and thereby then and there became distempered in their bodies and injured and endangered in their healths; to the great damage of the French prisoners, to the great discredit of our said Lord the King, to the evil example, &c. and against the peace, &c. There were eight other counts in the indictment charging the offence to have been done at different times, and at different prisons.

After conviction, it was objected in arrest of judgment that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with the

Ch. XVIII. § 4. *At common law.*

the public or of any moral or civil duty; and judgment was respited to take the opinion of the Judges. But in Michaelmas term 1796 they all held the conviction right.

The Defendant in the above case was in fact a contractor with government for the supplying of provisions to the French prisoners in the neighbourhood of Plymouth in the course of the then war; though that was not stated in the indictment on which the conviction took place. Nor was it material so to state it, otherwise than as matter of aggravation if such a case wanted any: for the giving of any person unwholesome victuals not fit for man to eat, lucri causâ, or from malice or deceit, is undoubtedly in itself an indictable offence, apart from any other consideration, which entered deeply into the demerits of the Defendant's conduct.

Vide 4 Blac. Com. 162.

Rex v. Jones, Coventry Lent Ass. 1777, cor. Nares J. MS. Gould J. (1 Leach, 208. S. C.)

Obtaining the King's bounty for enlisting as a soldier by an apprentice reclaimable by his master.

An indictment charged that Joseph Jones was an apprentice bound by indenture to serve one William Lucas, a jobbing smith, for the then remainder of a term of 7 years commencing from, &c. and that Defendant intending fraudulently and unjustly to obtain money from the paymaster of his majesty's 7th regiment of foot to defraud the King of divers sums of money, afterwards on, &c. unlawfully fraudulently and deceitfully caused and procured himself without the consent of his master W. L. to be enlisted into the said 7th regiment of foot as a soldier, by means whereof he the Defendant unlawfully fraudulently and deceitfully received and obtained from the paymaster of the said regiment divers sums of money amounting in the whole to the sum of 3*l.* 8*s.*; he the Defendant at the time of his enlisting into the said regiment and during his continuance therein then and there well knowing himself to be by the laws of this realm without the consent of his master the said W. L. disqualified from serving as a soldier in the said 7th regiment of foot, to the great deceit fraud and damage of the King, and against the peace, &c.

The facts were all plainly proved, except as to the indenture; and that was produced at the trial by the master, who proved the execution of it, and claimed his apprentice under it; but neither of the two subscribing witnesses were produced; which upon reference to the Judges after conviction was holden to be necessary in order to warrant the conviction.

Easter Term 1777.

In

Ch. XVIII. § 5. *At common law.*

§ 5.

Private cheats effected by conspiracy, or forgery. Vide many precedents in Trem. P. C. from p. 85. to 110. & ante, 817. 1 Hawk. ch. 71. s. 1.

In addition to those above-mentioned there are also instances to be found in the books of cheats in their nature private; which have been yet adjudged to be indictable at common law: but upon examination they will either appear to be founded in conspiracy or forgery; or as in some of the instances before put to implicate considerations of public justice, public trade, or public policy. They are subsequent to the stat. 33 H. 8. but prior to that of the 30 G. 2. Thus it is said by Hawkins, that the suppression of a will is indictable as a cheat; for which he cites Noy, 103. What the form of the count was in that case does not appear by the report; but as there were several persons convicted on the information filed against them by the Attorney-General, it is probable that they were charged with a conspiracy or combination. The same may be said of the case of Skirret and others, who were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written. So of Orbell's case, who was convicted upon a charge of having run a foot-race fraudulently and with a view to cheat a third person by a previous understanding with the running competitor to win.

Rex v. Breerton and others, Noy, 103.

Rex v. Skirret and others, 1 Sid. 312. Rex v. Parris and others, ib. 431.

Rex v. Orbell, 6 Mod. 42.

The case of Macarty and Fordenbourgh has been too generally quoted to be passed over without particular notice. The indictment charged that the Defendants, falsely and deceitfully intending to defraud T. C. of divers goods, together deceitfully bargained with him to barter sell and exchange a certain quantity of pretended wine as good and true new Portugal wine of him the said F. for a certain quantity of hats of him the said T. C.; and upon such bartering, &c. the said F. pretended to be a merchant of London, and to trade as such in Portugal wines, when in fact he was no such merchant, nor traded as such in wines; and the said M. on such bartering, &c. pretended to be a broker of London, when in fact he was not: and that T. C. giving credit to the said fictitious assumptions personating and deceits did barter sell and exchange to F., and did deliver to M., as the broker between T. C. and F., for the use of F., a certain quantity of hats of such a value for so many hogsheads of the pretended new Portugal wine; and that M. and F. on such bartering, &c. affirmed that it was true new Lisbon wine of Portugal,

Regina v. Macarty and Fordenbourgh, 2 Ld. Ray. 1179. and 3 Ld. Ray. 487.

Two effect a cheat, by the means of the one pretending to be a merchant and the other a broker, and as such bartering pretended wine for hats.

Ch. XVIII. § 5. *At common law.*

Portugal, and was the wine of F., when in fact it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to F.; to the great deceit and damage of the said T. C. and against the peace, &c. The indictment, which was for a cheat at common law, though it did not charge that the Defendants *conspired* eo nomine, yet charged that *they together*, &c. *did the acts* imputed to them, which might be considered to be tantamount: but it was thought to be a case of doubt and difficulty. One report of the case in Modern says that it was adjourned; and no further account is given of it. In Wheatly's case, as reported in Blac. Rep., Mr. Justice Dennison is made to say that the indictment in Macarty's case was quashed because there was no false token; though this is not supported by the report of the same case in Burrow; for the same learned Judge is there made to say that there were false tokens, or what were considered as such. In truth, on searching the rolls it appears that judgment was at last given for the Queen in Mich. 4 Ann. (*a*) But the true ground of that judgment, which was given by Mr. Justice Dennison in Wheatly's case (*b*), was that it was a *conspiracy;* and not the ground alluded to in the printed report of Govers's case; where speaking of Macarty's case Lord C. J. Ryder is made to say, (borrowed probably from the report in 6 Mod.) "that *the pretending to be a merchant* was there holden to be a false token." Yet what was that but a false affirmation simply?

Vide post. tit. Conspiracy. 6 Mod. 301.

1 Blac. Rep. 275.

2 Burr. 1128.

(*a*) Ld. Raymond's Report says Trin. 4 Ann.

(*b*) MS. Dunning, and *vide* 2 Burr. 1129. and 6 Mod. 302.

§ 6. *Cheating by means of forged instruments.*

In the case of Govers the indictment charged that the Defendant intending to cheat J. S. did deceitfully take upon himself the style and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and in order to induce J. S. to believe the same and to give him credit, the Defendant deceitfully *produced to J. S. several paper writings which he falsely affirmed to be letters from Spain, containing commissions for jewels, watches and other goods, to the amount of* 4,000*l.*; by means whereof the Defendant got into his hands two watches the property of J. S.: whereas in truth the Defendant was not a merchant, and the paper writings *containing such commissions* were *false and counterfeit.* Here the indictment was sustained on the ground that besides pretending to be a merchant, the Defendant produced several *forged* writings

Rex v. Govers, E. 28 Geo. 2. Sayer, Rep. 206.

writings as tokens, in corroboration of his assertion. It does not appear that the indictment contained any distinct averment that the paper writings, which the Defendant *affirmed* to be commissions from Spain for goods, did purport on the face of them to be such: but the averment at the end might perhaps be thought equivalent. The principal observation however arising on this case is, that it is not stated in the report that the indictment concluded against the form of the statute; although the false tokens made use of come directly within the words of the statute of Hen. 8. Therefore if this were sustained as an indictment at common law, the fraud being practised in a private transaction, and the false tokens mere private letters, having no semblance of public authenticity, the only ground on which the judgment can be maintained, without going the length of saying that the stat. of Hen. 8. was merely declaratory of the common law, is that the cheat was effected by means of a *forgery* (in which all are principals at common law); and that the publication of such forged instruments for the purpose of deceit was in itself a substantive offence indictable at common law.

It was not unusual formerly to prosecute forgeries, when successful, as cheats, before the various modern statutes by which in most instances they are now made capital felonies. In the report of Ward's case, in Strange, which was a case of forgery at common law of an acquittance, it was said that it could not be prosecuted *as a cheat* at common law *without an actual prejudice;* and that that was *an obtaining* on the statute 33 Hen. 8. This may serve to explain what was said in Micah Gibbs's case, where the Court held that the Quarter Sessions had no jurisdiction over the offence of forgery at common law; and that it being laid *as forgery*, they had no jurisdiction of it *as a cheat.* In that case the fraud was not successful; nothing was received by the Defendant, nor any thing lost by the prosecutor. But in Hales's case, who was indicted for falsely and deceitfully *obtaining* 450*l.* of William Harle *by a false token*, viz. *a promissory note* (*a*) in the name of Robert Hales, payable to S. E. &c. with a *counterfeit indorsement* thereon. The Lord C. B. instructed the jury that if it appeared to be a forged indorsement, the instrument *being a false token*, the Defendant must be found guilty. The

Ward's case, 2 Stra. 749. and *vide* R. v. Bryan, 2 Stra. 866. in R. v. Obrian, 13 Vin. Abr. 460. 2 Sess. Cas. 22. & ante, 817. n. *a.* Gibbs's case, 1 East. Rep. 173.

Wm. Hales' case, O. B. Jan. 1729, cor. Ld. C. B. Pengelly et al. Justs. 9 St. Tr. 75. and *vide* ib. 93. S.P.

(*a*) The Defendant was indicted as for a misdemeanor at common law, being before the statute making the offence felony.

Ch. XVIII. § 6. *At common law.*

like was ruled on a similar indictment against the same Defendant for defrauding another person. In Leander Fawcitt's case Eyre C. J. had no doubt that a counterfeit order (though void if genuine) which was effectual to procure a prisoner's discharge was indictable as a cheat; though he was not satisfied that the offence amounted to forgery.

Fawcitt's case, 1793, post. tit Forgery, ch. 19. s. 7.

§ 7. *By statute.*

I shall now proceed to set forth the two statutes, namely, that of the 33 Hen. 8. c. 1. and 30 Geo. 2. c. 24. which have confirmed or extended the principles of the common law in regard to this offence; and also to observe on the cases wherein indictments for cheats have been sustained either at common law or by the aid of one or other of those acts.

33 H. 8. c. 1. *Cheats by privy tokens or counterfeit letters.*

The stat. 33 Hen. 8. c. 1. after reciting that evil-disposed persons devising how they might unlawfully get into their possession goods chattels and jewels of other persons have *of late* to avoid the punishment of theft falsely and deceitfully contrived and devised "*privy tokens* and *counterfeit letters in other men's names*" unto divers persons their special friends and acquaintances for the obtaining of money, goods, &c. of the same persons their friends and acquaintances, by colour whereof they have unlawfully obtained the same; enacts, "that if any person or persons falsely and deceitfully obtain or get into his or their hands or possession any money goods chattels jewels or other things of any other person or persons by colour and means of any such false token, or counterfeit letter made in any other man's name, as aforesaid; every such offender being thereof lawfully convicted by witnesses taken before the Lord Chancellor, or by examination of witnesses, or confession taken before the justices of assize in their circuits, or before justices of the peace in their general sessions, or by action in any of the King's courts of record, shall suffer such correction and punishment by imprisonment, setting upon the pillory, or other corporal pain, except pains of death, as shall be adjudged," &c. (saving by s. 4. to the party grieved his civil remedy); and by s. 3. as well the justices of assize, as also two justices of the peace (one of the quorum) may commit or bail offenders to the assizes in general sessions to answer the same.

What tokens within the statute. 13 Vin. Abr. 460.

A false "*privy token*" within the statute has generally been taken to denote some real visible mark or thing, as a key, a ring,

ring, &c. A mere false affirmation or promise is certainly not such; as was ruled in Munez's case, who persuaded a woman who had a promissory note for 500*l.* to let him have it, under pretence that he had a friend in the house who would advance her money on it. How far the personating of another is such was before considered. And though *writings* generally speaking may be considered as *tokens*, yet they must be such as are made in the names of *third* persons; whereby some additional credit may be gained to the party using them; and not, as was holden in Lara's case before mentioned, the mere giving of the Defendant's own draft on a banker, with whom he had no credit; which was considered as no more than his bare assertion that the money would be paid. Upon the same principle in Wilders's case, his own marks on the vessels, denoting them to contain a greater quantity of liquor than they did, and his own letters affirming the same fact, were holden not to be false tokens. It seems then that the false token must be such as is calculated to gain the party some additional credit and confidence beyond his own assertion, or that which is resolvable into such. This inquiry however is become less important from the following statute.

Ch. XVIII. §7.

By statute 33 H 8. c. 1. *False tokens.*

R. v. Munez, Hil 13 Geo. 2. MS. Tracy, 142. 2 Stra. 1127. 7 Mod. 315. S. C.

R. v. Macarty, ante, 823.

Lara's case, ante, s. 2.

Wilders' case, ante, 819.

§ 8.

In furtherance of the provisions of the above statute it is further enacted by the stat. 30 Geo. 2. c. 24. s. 1. "That all "persons who knowingly and designedly by false pretence "or pretences shall obtain from any person or persons mo- "ney, goods, wares or merchandises, with intent to cheat "or defraud any person or persons of the same, shall be "deemed offenders against law and the public peace; and "the Court before whom such offenders shall be tried shall "on conviction order them to be fined and imprisoned, or "to be put in the pillory, or publicly whipped, or be trans- "ported according to the laws made for the transportation "of offenders, &c. for the term of seven years, as the Court "shall think fit." And by s. 2. any justice of peace, before whom any person charged on oath with any such offence shall be brought, may commit or bail the party to answer the complaint at the next general or quarter sessions of the peace, or next sessions of oyer and terminer, and shall bind over the prosecutors by recognizance in a reasonable sum to

30 Geo. 2. c. 24. *Cheats by false pretences.*

Ch. XVIII. §8. *B. statute 30 Geo. 2. c. 24. False pretences.*

to prosecute, or in a sum not less than double the amount of the money or goods fraudulently obtained if they shall exceed 20*l.* in value; and by s. 20. the certiorari is taken away (*a*).

Young's case, infra.

The term "*false pretences*" is of great latitude, and was used, as Ashhurst J. remarked in Young's case, to protect the weaker part of mankind, because all were not equally prudent: it seems difficult therefore to restrain the interpretation of it to such false pretences only against which ordinary prudence cannot be supposed sufficient to guard. But still it may be a question whether the statute extends to every false pretence, either absurd or irrational upon the face of it, or such as the party has at the very time the means of detecting at hand; or whether the words which are general shall be construed co-extensively with the cheat actually effected by means of the false pretence used. These may perhaps be matters proper for the consideration of the jury, with the advice of the Court; and I will not attempt to draw any precise line on the subject, the difficulty of doing which has been announced from high authority; but I shall content myself with referring to a recent case which may serve as a general comment on this branch of law.

Per Lord Kenyon C. J. in R. v. Young and others, infra.

Rex v. Young, Randal, Mullins, and Osmer, 3 Term Rep. 98. *Obtaining money under the false pretence of sharing a supposed bet said to have been before laid with another, and which was to be decided the next day.*

An indictment was framed on the stat. 30 Geo. 2. against Young and others, the first count of which stated, that the Defendants, fraudulently intending to obtain the money of the King's subjects by false colours and pretences, unlawfully and knowingly, &c. did falsely pretend to one Thomas, that Young had made a bet of 500 guineas on each side with a colonel in the army then at Bath, that one W. L. would on the next day run on the high road leading from Gloucester to Bristol 10 miles in length within one hour; and that Young and Mullins did go 200 guineas each in the bet, and Randal did go the other 100 guineas; and that under colour and pretence of such bet they obtained from Thomas as a part of such pretended bet 20 guineas of the 500 guineas: by which said false pretences the Defendants unlawfully, &c. obtained from the said Thomas the said 20 guineas, with intent to cheat and defraud him thereof; whereas in truth no such bet had been made, &c. against the form of the statute, &c. A second count stated the bet to have been made between Young and Osmer. It was ob-

(*a*) *Vide* Smith's case, Cowp. 24.

jected

jected in arrest of judgment, first, that the transaction itself was not the subject matter of a criminal prosecution; for that it did not affect the public; and it was such against which common prudence might have guarded; for being the representation of a *future* transaction, the party had an opportunity of enquiring into the truth of it, and therefore it was his own fault if he were deceived. Secondly, that the offence was not charged with sufficient certainty, inasmuch as the colonel's name was not mentioned. *Lord Kenyon* C. J. said, that the stat. 30 Geo. 2. c. 24. was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit. The statute 33 H. 8. c. 1. required a false seal or token to be used, in order to bring defrauders into the confidence of the person imposed upon. But that being found to be insufficient the stat. 30 Geo. 2. c. 24. introduced another offence describing it in terms extremely general. That when the criminal law was auxiliary to the law of morality, he did not feel any inclination to explain it away. Now this offence was within the words of the act; for the Defendants had by false pretences fraudulently contrived to obtain money from the prosecutor, who perhaps too credulously gave confidence to them. As to the second objection; the charge was sufficiently certain to enable the Defendants to know what they were called upon to answer for. Perhaps the colonel's name with whom the wager was stated to have been made was not mentioned; so that he could not have been described with greater accuracy. But if such a wager had been actually depending, it was competent to the Defendants to have proved it in their defence. *Ashhurst* J. observed that the legislature were aware that all men were not equally prudent, and that the stat. 30 Geo. 2. was passed to protect the weaker part of mankind. The words of it were very general, and the Court could not restrain their operation. *Buller* J. in commenting on the operation of the statute 30 Geo. 2. said that it clearly extended to cases which were not the subject of an indictment at common law or by the stat. 33 H. 8. That the ingredients of this offence were the obtaining money by false pretences and with an intent to defraud:

Ch. XVIII. § 8.

By statute 30 Geo. 2. c. 24. False pretences.

Vide ante, 817. for further observations on these statutes.

Ch. XVIII. § 8.

By statute 30 Geo. 2. c. 24. False pretences.

defraud: barely asking another for a sum of money was not sufficient, but some pretence must be used, and that pretence false; and the intent was necessary to constitute the crime. He then mentioned a case which was tried before Morton C. J. of Chester and himself at Chester. The Defendant applied to Sir T. Broughton, telling him that he was instructed by the Duke de Lauzun to take some horses from Ireland to London, and that he had been detained so long by contrary winds that his money was spent. Sir T. Broughton was thereupon induced to advance some money to him. But it afterwards appearing that the whole story was a fiction, the Defendant was tried for a cheat on the stat. 30 Geo. 2. and convicted.

Rex v. Count Villeneuve, 1778. *Pretending to have been entrusted by one to take his horses from Ireland to London, and to have been detained by contrary winds, till his money was expended.*

Witchell's case, Gloucester Sp. Ass. 1798. MS. Jud. *A workman employed by clothiers was to keep an account of the number of shearmen employed and the amount of their earnings and wages, which he was weekly to deliver in in writing to a clerk, who paid him the amount. He delivered in a false account, charging for more work and of other men than done, by which he obtained a larger sum than was due. This is obtaining money by a false pretence within the 30 G. 2. c. 24.; because without the false pretence he would not have obtained the credit; and is not like a case of money paid generally on account.*

John Witchell was indicted before Lawrence Justice on the stat. 30 Geo. 3. c. 24. for obtaining money from A. and H. Austin, by false pretences. It appeared in evidence that the Austins were clothiers at Wooton-under-Edge; that the prisoner was a shearman in their service, and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings; that at the end of each week he was supplied with money to pay the different shearmen by the clerk of the prosecutors, who advanced to him such sum as according to a written account or note delivered to him by the prisoner was necessary to pay them. The prisoner was not authorized to draw from the clerk for money generally *on account*, but merely for the sums actually earned by the shearmen; and the clerk was not authorized to pay him any sums except what he carried in in his account or note as the amount of what was due to the shearmen for the work they had done. It appeared that the prisoner on the 9th September 1796 delivered to the prosecutors' clerk a note in writing in this form—" 9th September 1796, shearmen £. 44 - 11 - 0", which was the common form in which he made out his account of the amount of their week's wages. And it appeared further by a book in his hand-writing (which it was his business to keep of the men employed, of the work they had done, and their earnings) that there were in it the names of several men who had not been employed, who were entered as having earned different sums of money, and false accounts of the work done by those who were employed; so as to make

make out the sum stated in the note to be due to the shearmen. The jury found the prisoner guilty; but sentence was respited in order to take the opinion of the Judges whether this case were within the stat. 30 Geo. 2.; the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here.

Ch. XVIII. § 8.
By statute 30 G. 2. c. 24. False pretences.

The Judges first conferred on the case in Easter term 1798, when there was some diversity of opinion on the true construction of the statute in this respect: but finally they all agreed in Trinity term following, on this principle, *that if the false pretence created the credit* the case was within the statute: and they considered that in this case the Defendant would not have obtained the credit but for the false account which he had delivered in, and therefore that he was properly convicted. The Defendant, as was observed by one of the Judges, was not to have any sum that he thought fit on account, but only so much as was worked out.

In Airey's case the indictment charged that one Barrow at K., &c. delivered to the Defendant a common carrier certain goods to be carried by him from K. to one Leach at L., there to be delivered, &c. That the Defendant received the goods under pretence of carrying and delivering them, and undertook so to do; but that intending to cheat Barrow of his money he afterwards unlawfully, &c. pretended to Barrow that he had carried the goods from K. to L. for the purpose of delivering them to Leach, and had delivered them to Leach at L., and that Leach had given him, the Defendant, a receipt expressing such delivery of the goods to him, but that he had lost or mislaid the same or had left it at home; and that the Defendant thereupon demanded of Barrow 16*s.* for the carriage of the said goods; by means of which false pretences he obtained the money, &c. On a writ of error after conviction the judgment was affirmed.

Rex v. Airey, M. 42 Geo. 3. 2 East's Rep. 30. post. s. 13.
A carrier obtains the money agreed for by pretending to have delivered the goods, and to have lost the bailee's receipt.

§ 9.
How far the statutes of H. 8. *and* G. 2. *vary from the common law.*

Though the stat. 33 H. 8. c. 1. naming *privy tokens* and *counterfeit letters* in other men's names, and the stat. 30 Geo. 2. c. 24. including *false pretences* in general may seem to have embraced every species of cheat not guarded against by the common

Ch. XVIII. § 9. *How the stats. of H. 8. and G. 2. vary from common law.*

common law, which without doubt included every cheat effected by means of any false token having the semblance of public authority, or in any manner touching the public interest, or in any other manner by conspiracy or forgery; yet it is still important to inquire how far these statutes vary in any respect from the common law or from each other; for both of them are confined to cheats whereby *money* or *goods* are obtained, and therefore they would not in terms embrace *choses in action*, as bonds, bills, or other written securities for money; though these being now made subject matters of larceny of the same nature and in the same degree as if the offender had stolen any other goods of like value with the money due thereon, it may be questionable whether the fraudulent obtaining (which is included in larceny) of such securities by means even of a privy token or false pretence is not also indictable by help of the statutes; or at least whether such fraudulent obtaining be not indictable at common law in every instance where the obtaining goods of the like value would be so indictable. It was also said in Pear's case that the statutes of Hen. 8. and Geo. 2. were confined to cases where credit was obtained *in the name of a third person*, and did not extend to cases where a man on his own account got goods *with an intention to steal them*. The latter branch of the dictum is undoubtedly true as to both the statutes, in the sense in which it was there applied, in contradistinguishing cases of larceny from cheats. The former branch is also clearly founded upon the express words of the stat. of H. 8., which speaks of "privy tokens and counterfeit letters *in other men's names*." But it cannot fail to be noted that the words of the statute of Geo. 2. are much more general, and have no such restrictive words; and indeed it was purposely passed in order to supply the deficiencies of the former statute. Besides, such an interpretation seems scarcely consistent with the doctrine in Young's case, in Witchell's case, and other authorities. In the former Buller J. said that the ingredients of the offence within the statutes were the obtaining by false pretences, with intent to defraud; that if the intent were made out and the false pretence used to effect it, the case was brought within the statute.

2 Geo. 2. c. 52. s. 3. ante, tit. Larceny and Robbery, 597. *Vide* Dean's case, ante, 749.

Ante, 689.

Ante, 828. 830.

Ward's case, 2 Ld. Ray. 1466. & Obrian's case, 7 Mod. 378. post. tit. Forgery.

In Ward's case and in Obrian's case which will be elsewhere noticed, it was said that the stat. 32 H. 8. c. 1. creates no new offences;

offence; but only enhanced the punishment of such as were offences at common law. The former part of this was undoubtedly true with respect to the offences then in judgment, which were *forgeries;* for so far the stat. 33 H. 8., which mentions counterfeit letters, was only in confirmation of the common law. And this may serve to explain other general expressions of the same tendency to be met with in several cases which have been already referred to, from whence it might otherwise be collected that every case was supposed to fall within the scope of the common law where a false token was used: but other authorities mentioned seem to restrict the generality of this position, and to confine the operation of the common law in that respect to such cheats in private transactions as are effected by means of false tokens of a public nature, of which false weights and measures, false dice, and false marks known and used in trade are given as examples. Therefore though a false token (other than a forgery) be used to accomplish a cheat, yet it may be doubted whether to make the offence indictable at common law it must not be such a token as is of a public nature, claiming public confidence and thereby calculated to deceive people in general, and not such a *privy* token as is merely adapted to delude a credulous or incautious individual in a private transaction between the parties. If this be received as the true exposition it will account for the passing of the stat. 33 Hen. 8. c. 1. and the particular wording of that law. Nothing appears either by the title or preamble of the statute to shew that it was passed to obviate any doubts in the common law; neither is it so considered by Lord Coke: but rather it purports to provide for offences which had *then lately* sprung up in order to evade the punishment of larceny. The title of the act is "a bill against them that counterfeit letters or *privy* tokens to receive money or goods *in other men's names.*" The use of false *public* tokens for defrauding others was clearly punishable at common law as a cheat. The necessity then of the statute was to reach frauds which were accomplished by means of *privy* tokens. These privy tokens and counterfeit letters must also, as appears from the title, the preamble, and the enacting part, be made *in other men's names.* An argument then arises upon the particular wording of the stat. 33 H. 8. against the supposition that cheating by means of

Ch. XVIII. § 9. *How the stats. of* H. 8. *and* G. 2. *vary from common law.*

Vide Rex v. Wheatley, 2 Burr. 1127. Young and others v. Rex, in Error, 3 Term Rep. 104.

3 Inst. 133.

Ch. XVIII. § 9. every species of false token was punishable at common law without the aid of that statute; for then so far from there being any necessity for it in suppression of fraud, which the preamble assumes, it was even restrictive of the common law: and the reason given for it in Ward's and Obrian's case, namely, that it went only to enhance the punishment, is not well founded; the punishments inflicted by the statute being no more than would be warranted by a judgment at common law for a misdemeanor of such a nature, and it does not even include the power of finding. The stat. 30 Geo. 2. c. 24. does indeed enhance the common law punishment by enabling the court to transport the offender: but that statute extending the offence to cheating by means of *false pretences* is on all hands admitted to be introductive of a new law.

How the stats. of H. 8. and G. 2. vary from common law.

Post. s. 14.

§ 10. *Frauds by particular persons.*

There are various other provisions by statute for the punishment of particular kinds of frauds or cheats; most of which have been already referred to under former heads; such as those by goldsmiths, &c. in working up plate (*a*), embezzlements and frauds by *servants* (*b*), by *officers of the Bank* (*c*), and of other *public companies* (*d*), by persons in the *post-office* (*e*), by *manufacturers* (*f*), by *lodgers* (*g*), by persons entrusted with the King's *naval and military stores* (*h*), and by those entrusted with *ships and goods at sea* (*i*).

Ante, (*a*) 194. (*b*) 560. (*c*) 578. (*d*) 579. (*e*) ib. & 604. (*f*) 584. (*g*) 585. (*h*) 621. & 755. (*i*) 800. and *vide* post. *Malicious Mischief. Bankrupts.*

Frauds committed by *bankrupts* will be considered hereafter, together with other offences against public trade with which they are mingled.

Vide tit. Nuisance.

Others it is sufficient here barely to refer to; as the stat. 6 Geo. 1. c. 18. against entering into public subscriptions for certain schemes of commerce, &c. which is made indictable as a nuisance; and the stat. 37 Geo. 3. c. 143. which gives a summary jurisdiction to justices of the peace in petty sessions to punish retailers in whose possession false weights and balances shall be found.

False weights and balances.

§ 11. *Fraudulent conveyances, &c. by 13 Eliz. c. 5.*

The stat. 13 Eliz. c. 5. against fraudulent deeds, alienations, &c. reciting "that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, are contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay hinder or defraud creditors and others of their just and lawful actions,

By stat. 27 Eliz. c. 4. *fraudulent conveyances, &c.*

" tions, suits, debts, account, damages, penalties, forfeitures, " heriots, mortuaries, and reliefs," &c.: It therefore (s. 1.) declares and enacts " that all and every feoffment, gift, " grant, alienation, bargain and conveyance of lands, tene- " ments, hereditaments, goods and chattels, or of any of " them, or of any lease, rent, common, or other profit or " charge out of the same lands, &c. by writing or other- " wise, and all and every bond, suit, judgment, and execu- " tion, to or for any intent or purpose before declared and " expressed, shall be deemed (as against the party grieved) " utterly void," &c. And then it enacts (by s. 3.), " That " all and every the parties to such feigned, covinous, or " fraudulent feoffment, gift, grant, alienation, bargain, con- " veyance, bonds, suits, judgments, executions, and other " things before expressed, (viz. for the purpose of delaying " hindering or defrauding creditors and others) and being " privy and knowing of the same, who shall wittingly and " willingly put in ure, avow, maintain, justify or defend the " same, as true simple and done had or made bonâ fide and " upon good consideration; or shall alien or assign any the " lands, tenements, goods, leases, or other things before " mentioned to him or them conveyed as aforesaid, or any " part thereof, shall incur the penalty and forfeiture of one " year's value of the said lands, &c. of or out of the same, " and the whole value of the said goods and chattels, and " also so much money as are or shall be contained in any " such covinous and feigned bond; one moiety to the crown, " the other to the party grieved, to be recovered in any of " the Queen's courts of record by action, &c.; and also being " thereof lawfully convicted shall suffer imprisonment for one " half year without bail or mainprise."

27 Eliz. c. 4. *Fraudulent conveyances, &c. to defeat or prejudice purchasers.*

Then by stat. 27 Eliz. c. 4. (*a*) reciting that subjects and corporations " after conveyances and purchases of lands, " tenements, leases, estates, and hereditaments for money or " other good consideration may incur loss and prejudice by " reason of fraudulent and covinous conveyances, estates,

(*a*) Copyholds were holden not to be within this act by Blencowe J. at Launceston 1699. Bull N. P. 108. But in Doe d. Watson v. Routledge, B. R. M. 18 G. 3. Lord Mansfield C. J. said that dictum was of no authority, and ought to be rejected. And Aston J. remembered a case to the contrary: though the Court reserved giving any decisive opinion. Dougl. 716. n.

" gifts,

Ch. XVIII. § 11. *By stat.* 27 Eliz. c. 4. *fraudulent conveyances, &c.*

" gifts, grants, charges, and limitations of uses, made or to " be made in or out of lands tenements or hereditaments so " purchased, which said conveyances, &c. were or shall be " meant by the parties to be fraudulent and covinous, of " purpose to deceive such as have or shall purchase the " same; or else by the secret intent of the parties the same " be to their own proper use, and at their free disposition, " coloured nevertheless by a feigned countenance and shew " of words and sentences as though the same were made " bonâ fide, &c. for remedy, (s. 2.) And for avoiding such " fraudulent conveyances, &c." it enacts " that every con- " veyance, grant, charge, lease, estate, incumbrance, and " limitation of use or uses, of in or out of any lands tene- " ments or other hereditaments whatsoever made heretofore, " &c. or at any time to be made for the intent and of pur- " pose to defraud and deceive such person or persons, bodies " politic or coporate as have purchased or shall afterwards " purchase in fee simple, fee tail, for life lives or years, the " same lands, &c. or any part or parcel thereof, so formerly " conveyed, granted, leased, charged, incumbered, or li- " mited in use, or to defraud and deceive such as have or " shall purchase any rent, profit, or commodity, in or out of " the same or any part thereof, shall (against the parties or " those claiming under them) be utterly void," &c. And by Sect. 3. " All and every the parties to such feigned, co- " vinous and fraudulent gifts, grants, leases, charges, or " conveyances before expressed, or being privy or knowing " of the same or any of them, who shall wittingly and wil- " lingly put in ure, avow, maintain, justify, or defend the " same or any of them, as true simple and done, had or " made, bonâ fide, or upon good consideration, to the dis- " turbance or hindrance of the said purchaser or purchasers, " lessees, or grantees, or of their heirs, successors, executors, " administrators or assigns, or such as shall lawfully claim " any thing by from or under them or any of them, shall " incur the penalty and forfeiture of one year's value of the " said lands tenements and hereditaments so purchased or " charged, (one moiety to the Crown, the other to the party " grieved, to be recovered by action, &c.); and also being " thereof lawfully convicted shall suffer imprisonment for " one half year, without bail or mainprise."

By

Ch. XVIII. § 12.

By stat. 9 Ann. c. 14. *cheating with dice, &c.*

By stat. 9 Ann. c. 14. s. 5. "If any person or persons "shall by any fraud or shift, cousenage, circumvention, "deceit, or unlawful device, or ill practice whatsoever, in "playing at or with cards, dice, or any the games afore-"said(*a*), or in or by bearing a share or part in the stakes, "wagers, or adventures; or in or by betting on the sides or "hands of such as do or shall play as aforesaid, win, obtain, "or acquire to him or themselves, or to any other or others, "any money or other valuable thing or things whatsoever, "or shall at any one time or sitting win of any one or more "person or persons whatsoever above the sum or value of "10*l.*; and being convicted of any of the said offences upon "an indictment or information to be exhibited against him "or them for that purpose, shall forfeit five times the value "of the money or other thing so won as aforesaid, and in "case of such ill practice as aforesaid shall be deemed in-"famous, and suffer such corporal punishment as in cases of "wilful perjury; and such penalty to be recovered by such "person or persons as shall sue for the same by such action "as aforesaid (*b*)."

§ 12. *Cheating with dice, &c.* 9 Ann. c. 14. and *vide* other provisions in this act and 16 Car. 2. c. 7. giving actions to the party grieved to recover penalties.

In Lookup's case the Court held that they had no authority on such conviction to set a fine upon the offender; but on judgment given that he is convicted, &c. the penalty shall be recovered thereon by the informer.

Lookup's case, 2 Stra. 1048. 7 Term Rep. 461.

Form of Indictment.

As to the form of the indictment, where the charge is for cheating by false tokens, it is necessary both at common law and upon the stat. 33 H. 8. to set forth what the false tokens are; in like manner as it is necessary to describe the false pretences in an indictment founded on the stat. 30 Geo. 2. And in neither case is it enough to allege generally that the cheat was effected by means of certain false tokens or false pretences. The reason of which was given by Grose J. in delivering the opinion of the Judges in Fuller's case, that there may be some false pretences not within the statute, and therefore they must be set out, that the Court may see what they were. But it does not appear necessary to describe

§ 13. *Form of indictment.* Rex v. Munoz, 7 Mod. 316. 2 Stra. 1127. and Eddy's case, H. 10 Ann. MS. Tracy, 142. Rex v. Mason, 2 Term R. 581. Fuller's case, MS. Jud. ante, 92. and post. Indictment, General Form. Rex v. Young and others, ante, 828.

(*a*) The games before mentioned are "Cards, Dice, Tables, Tennis, "Bowls, *or other game or games whatsoever.*"

(*b*) The *qui tam* actions are before mentioned.

the

Ch. XVIII. § 13. *Form of Indictment.*

them more particularly than they were shewn or described to the party at the time, and in consequence of which he was imposed upon. Also, it does not seem necessary to make any express allegation that the facts set forth shew a *false token* or a *false pretence;* for in Terry's case, where the indictment on the stat. 33 H. 8. charged that he by a *false note* in the name of J. D. obtained into his hands a wedge of silver, &c.; it was holden well enough, though it were not said to be a *false token.*

Terry's case, Cro. Car. 564.

Rex v. Airey, M. 42 G. 3. 2 East's Rep. 30. *Vide* ante, 831.

In Airey's case before mentioned the indictment which was framed on the stat. 30 G. 2. after alleging that the Defendant unlawfully knowingly and designedly pretended so and so, proceeded thus—" by means of which said *false* pretences the Defendant unlawfully, &c. obtained from J. B. 16*s.* with intent to cheat the said J. B. of the same," &c.; and then proceeded to negative the truth of the pretences used. This was holden to be sufficient without alleging in express terms that the pretences were false; or rather it was considered that the whole indictment taken together did amount to an express allegation that the pretences were false; and that there was no technical form or order of words required so to express the offence, if upon the whole it appeared that the money had been obtained by means of the pretence set forth, and that such pretence was false.

Rex v. Young and others, 3 Term Rep. 98. Ante.

Several may be charged jointly in an indictment with the same cheat; as if they be present and concurring at the time with those by whom the false tokens or pretences are shewn by act or speech.

§ 14. *Punishment.*

At common law the punishment for a cheat is as in other cases of misdemeanor by fine, imprisonment, or further by infamous corporal pain in aggravated cases. How this has been confirmed or extended by the two stats. of H. 8. and Geo. 2. has been already shewn. Lord Coke says that offenders can only suffer corporal punishment, but cannot be fined by force of the stat. 33 H. 8. alone; though Hawkins refers to a precedent in Croke's Rep. where an offender was fined for a cheat falling within that statute, on which the indictment was laid. Cases however may occur where the offender may be fined at common law as well as corporally punished under that statute, which certainly was not meant

3 Inst. 133. 1 Hawk. ch. 71. s. 6. Terry's case, Cro. Car. 564.

to

to abridge but rather to extend the common law. And such upon examination might well have been done there; for the false token there laid was *a false note* in the *name of another person;* which was a direct forgery at common law. So now there can be no offence either at common law or by the statute of H. 8. which is not also comprehended within the act of the 30 Geo. 2. (subject to the observation before made), though the reverse does not hold good.

(Ante, 832.)

Where goods have been obtained from another by mere fraud, the Court have no power of awarding restitution on conviction of the offender, as in cases of felony.

Vide ante, 789. Parker v. Patrick, 5 Term Rep. 175. and R. v. De Vaux and others, 2 Leach, 666.

CHAP. XIX.

FORGERY.

Definition. - - - - § 1.
The false making or Alteration of any written Instrument whereby another may be prejudiced, with Intent to deceive and defraud.
Punishable as Misdemeanor at Common Law. ib.
General Division. - - - § 2.
I. *With what Intent the Act must be done.* § 3.
With Intent to deceive and defraud, though none be actually defrauded. *ib.*
But Q. Alteration not fraudulent may avoid a Security. *ib.*
II. *What false making or Alteration amounts to Forgery.* - - - § 4.
The Act alone before Publication. *ib.*
Publication with Knowledge made a substantive Offence by Statute in certain Cases. *ib.*
Forging Deed in the Party's own Name. *ib.*
Indorsing Bill of Exchange payable to another of the same Name. *ib.* Or putting off a Note made in Truth in the Party's Name as the Note of another. *ib.*
Making fraudulent Insertion, Alteration, or Erasure, in material Part of a true Instrument; though executed afterwards by the true Party, not knowing thereof. *ib.*
But not a mere Omission to insert a Clause in it before Execution; unless such Omission alter the Sense of what is inserted. *ib.*
Nor a fraudulent personating of the true Man: but Indictment lies for the Conspiracy and Cheat. § 5.
Resemblance of false to true Instrument need not be perfect. - - - - § 6.

III. *Of*

III. *Of what Instruments, &c. Forgery may be committed.* - - - - § 7.

1. *At Common Law.*

Of Records, and other public Instruments; of private Deeds, &c. under Seal, Wills, and other Instruments or Writings, such as an Acquittance for Goods, or Order to appropriate them to the Party's Use, whereby any Person may be injured or defrauded. *ib.*

Q. As to a pretended Order or Authority to a Gaoler to release a Prisoner, which if genuine was a Nullity. *ib.*

2. *By Statute;* relating - - - - § 8.

1. *To Records*, avoiding, rasing, or altering such, Felony by Stat. 8 H. 6. c. 12. and 8 Ric. 2. c. 4. § 9. *a*

2. *To the Transfer of public Funds, and the Stocks of public Companies.* - - - § 9. *b*

The Forgery of any *Order*, *Assignment*, *Receipt*, *Discharge*, *Letter of Attorney*, or *other Authority or Instrument to transfer*, &c. any Share or Annuity of any capital Stock established or to be established by Parliament, or of any public Company; or to receive any such Annuity or Dividend; or forging the *Name of any Proprietor*, &c. to such Letter of Attorney, &c.; or *knowingly demanding* or *endeavouring* to have such Share transferred, &c.; or such Dividend received, &c.; or procuring or assisting, &c. therein; Felony without Clergy, by Stat. 9 G. 1. c. 22. 31 Geo. 2. c. 22. s. 77. and 4 Geo. 3. c. 25. s. 15. *ib.*

Extended by 33 Geo. 3. c. 30. to Transfers of Stocks in the Names of any other than the Owners. *ib.*

Forging or assisting to forge, or uttering, &c. forged *Transfers*. *ib.*

Also to Persons making or assisting to make *false Entries* in the Books of the Bank. *ib.*

Making out *false Dividend Warrants*, Transportation for 7 Years. *ib.*

Forging *Names of Witnesses to Instruments* for Transfer or Receipt of Public Stock, or Stock of the Bank,

South-Sea, or East-India Companies, Felony, by Stat. 37 Geo. 3. c. 122. - - - § 9. *b*

Extended to certain Irish Funds made payable at the Bank of England by Stats. 35 Geo. 3. c. 66. and 37 Geo. 3. c. 46.

One may be indicted for forging a Transfer of Stock of which A. was charged to be possessed of and entitled to; though he had not accepted such Transfer as directed by Statute. *ib.*

3. *Notes and other Securities of the Bank of England and other public Companies.* - - § 10.

i. *Securities of the Bank of England;* Forgery thereof, or demanding Money thereon, made Felony without Clergy by Stat. 15 Geo. 2. c. 13. - § 10.

So of *Common Seal* by several Stats. of Will. 3.

Having in Possession (except by Persons authorized) of *Instruments, &c. for making Paper* (like that used by the Bank of England in their Notes in the Respects therein mentioned); or assisting, &c. Felony without Clergy, by Stat. 13 Geo. 3. c. 79. *ib.*

Making Plates, &c. with Words (*Bank of England*, &c. or *the Sums*) in *white Letters on black Ground;* or using such Plates; or knowingly having such in Custody; or wilfully uttering such Notes, &c. Imprisonment. *ib.*

Making or *having in Possession* certain *Paper* like the Bank *with curved Lines*, &c. Felony and Transportation for 14 Years by Stat. 41 Geo. 3. c. 39. *ib.*

Knowingly receiving or *having in Possession* forged Bank Notes, &c. without lawful Excuse, Felony and Transportation for 14 Years. *ib.*

Engraving Plate, &c. like Bank Note, or *using*, or *knowingly having such in Possession*, without written Authority, or *uttering*, &c. Felony and Transportation for 7 Years. *ib.*

What a *rasing* of an *Indorsement* on a Bank Bill. § 11.

What a sufficient Resemblance to a Bank Note, &c. to be said to *purport* to be such. *ib.*

ii. *Securities of South-Sea Company.* - § 12.

Forgery

Forgery of *Common Seal, Bonds*, &c.: *offering to dispose of* or *put away* the same knowingly, &c.; *demanding Money thereon*, &c. with Intent to defraud the Company or any other; Felony without Clergy by Stat. 9 Ann. c. 21. and 6 Geo. 1. c. 4. § 12.

So forging *Indorsement* or *Assignment* of such Bond, &c. by Stat. 12 Geo. 1. c 32. *ib.*

So forging *Receipts* for Stock and Dividend Warrants, or uttering the same, &c. by Stat. 6. Geo. 1. c. 11. *ib.*

iii. *London and Royal Exchange Assurance Company, and Globe Insurance Company*, protected by similar Provisions, extending also to *Policies* and *Bills.* § 13.

iv. *East-India Company.* § 14.

Forging *Bond, Indorsement*, or *Assignment;* or uttering or publishing such; Felony without Clergy, by Stat. 12 Geo. 1. c. 32. s. 9. *ib.*

v. *Plate Glass Manufactory Company.* - § 15.

Forging *Seal*, or *Deed or Writing under Seal;* or *demanding Money* in pursuance thereof; Felony by Stats. 13 Geo. 3. c. 28. and 33 Geo. 3. (c. 17.) s. 23.

4. *Stamps.* - - - - § 16.

Forgery thereof on written *Instruments* on which *public Duties are levyable* made capital Felonies by the respective Revenue Acts. *ib.*

Fraudulently *using Stamps a second Time* by transposing them or erasing, &c., Words in the Stamped Instrument; Felony and Transportation by stat. 12 Geo. 3. c. 48. Q. Made capital in some Cases by subsequent Statutes. § 17.

So forging *Essay Marks* or *Duty Stamps* on *Gold* or *Silver Plate* by Stats. 31 Geo. 2. c. 32. s. 15. and 24 Geo. 3. st. 2. c. 53. s. 16. - - § 18.

But forging other Marks required by Stat. 38 Geo. 3. c. 69. only Felony and Transportation for 7 Years. *ib.*

Construction on the Stamp Acts. - - § 19.

Indictment for uttering Pieces of *Paper liable to the Receipt Duty*, held well. *ib.*

" Duties

"Duties of Excise" and "Duties under the Management of the Commissioners of Excise," are tantamount Expressions under Stat. 27 Geo. 3. c. 13. s. 35. 38. and the Penalty of forging Stamps in respect of Duties of the latter Sort revived under the former Denomination. - - - § 19.

Indictment charging the Duty to be laid "for, on and "in respect of," is good; though the Words of the Act be "for and upon." *ib.*

5. *Official Papers, Securities, and Documents.* - § 20.

i. Forging *Testimonials of Soldiers and Mariners* a capital Felony by Stat. 39 Eliz. c. 17. s. 3. *ib.*

ii. Forging, &c. *Memorials of Registry of Deeds and Wills*, and *of Bargains and Sales* in Yorkshire and Middlesex, capital Felonies by several Statutes. § 21.

iii. Forging *Documents* relating to *Suitors in Chancery*, capital Felony by Stat. 12 Geo. 1. c. 32. s. 9. § 22.

iv. Forging *Mediterranean Passes*, capital Felony by Stat. 4 Geo. 2. c. 18. - - § 23.

v. Forging *Marriage Registers and Licences*, capital Felonies by Stat. 26 Geo. 2. c. 33. s. 16. § 24.

vi. Forging *Seamen's Letters of Attorney*, &c. to receive Wages, Prize Money, &c. *Last Wills*, or *other Powers or Authority whatsoever* for such Purpose; or *uttering* or *publishing* the same: or forging *Certificate of Discharge*, &c.

Or *Certificate* to obtain *Letters of Administration* to *Seamen*, and *other Documents to receive Wages*, &c. Felony without Clergy by various Statutes. § 25.

Muster-Books of the Navy Office Evidence. *ib.*

vii. Forging *Prefines*, Felony without Clergy by Stat. 32 Geo. 2. c. 14. s. 9. - - § 26.

viii. Forging *Franks of Letters*, Felony and Transportation by Stat. 24 Geo. 3. st. 2. c. 37. s. 9. § 27.

ix. Forging, &c. of *Exchequer Bills*, *Orders*, *Assignments*, &c. capital Felonies by the several Acts. § 28.

x. So of *Lottery Tickets*. - - § 29.

xi. *Re-*

xi. *Receipts* for *Duties on Legacies*, altering thereof, a Penalty of 500*l.* Forging *Stamps* thereof capital Felony by Stat. 36 Geo. 3. c. 52. - § 30.

xii. Making or subscribing *false Certificates of Naval or Military Stores*, a Misdemeanor. - § 31.

xiii. Forging, &c. *Contracts*, *Assignments*, *Certificates*, or *Receipts*, *respecting the Redemption of the Land-tax* a capital Felony by Stat. 42 Geo. 3. c. 116. s. 194. § 31. *b*

6. *Private Papers*, *Securities*, *and Documents.* § 32.

i. Forging *Deeds*, *Charters*, *Writing sealed*, *Court Roll*, *or Will*, to molest, defeat, charge, &c. the Estate of Freehold or Inheritance of any Person; or knowingly publishing or shewing in Evidence any such (except by Attornies, &c. for Clients); Misdemeanor, and subjected to infamous Punishment by Stat. 5 Eliz. c. 14. *ib.*

Forging the like Deeds, &c. with Intent for any to claim Estate for Term of Years, &c. Or

Forging any *Obligation*, *Acquittance*, *Release*, *or Discharge* of any Debt, &c. or other Thing personal; or knowingly pronouncing or publishing, &c. the same, Misdemeanor, &c. *ib.*

Committing any of such Offences a second Time, (i. e. after Conviction by Judgment) Felony without Clergy. *ib.*

Construction of the Stat. 5 Eliz. c. 14. - § 33.

To what Estates the Stat. extends. *ib.*

To what Writings. *ib.*

ii. Forging any *Deed*, *Will*, *Testament*, *Bond*, *Writing-Obligatory*, *Bill of Exchange*, *Promissory Note for the Payment of Money*, *Indorsement or Assignment of such Bill or Note*, *Acquittance or Receipt for Money or Goods*, with Intent to defraud any Person (or by Stat. 31 Geo. 2. c. 22. s. 78. any Corporation); or *uttering or publishing* the same as true; Felony without Clergy, by Stat. 2 Geo. 2. c. 25. and 9 Geo. 2. c. 18. - - - - - § 34

Extended by Stat. 7 Geo. 2. c. 22. and 18 Geo. 3. c. 18. to *Forgers*, *Procurers*, or *Assisters* in forging of any *Acceptance*

Acceptance of any Bill of Exchange, or *the Number or principal Sum of any accountable Receipt for any Note, Bill, or other Security for Payment of Money*, or any *Warrant or Order for Payment of Money or Delivery of Goods.* - - - - § 34.

Knowingly *uttering or publishing* the same. *ib.*

Quære. Whether uttering in England a Bank Note made and payable in Scotland be within the Acts as a *Writing-Obligatory.* - - - § 35

What a *Receipt for Money.* - - § 36

Indictment for forging a Receipt, viz. "Received the "*Contents above* by me," &c. is sufficient, without setting forth the Bill of Items to which it refers. *ib.*

Receipt for *Bank Notes* not a Receipt for *Money* or *Goods* within Stat. 2 Geo. 2. c. 25. *ib.*

Nor a forged Receipt for *Bank Notes* with Intent to defraud a *Corporation*, within the Stat. 7 Geo. 2. which only names *Persons*. *ib.*

But that now aided by Stat. 18 Geo. 3. c. 18. *ib.*

A false Entry of a Sum and a Date as by the Bank on the Debtor Side of their Cash Book kept by a Customer, is a Receipt for Money, &c. within the Acts. *ib.*

But where the Words forged do not in themselves purport to be a Receipt (as a mere Name), but are only so as connected with some other Matter, such Connection must be shewn in the Indictment. *ib.*

A Scrip Receipt with the Blank not filled up with any Person's Name, from whom it was supposed to be received, is not a Receipt for Money within the Statutes. *ib.*

A false Voucher forged in the Name of a third Person, as acknowledging the Receipt of Money by such Person to the Forger in order to obtain Reimbursement from another on the Credit of such Voucher, is within the Statues. *ib.*

What a *Warrant or Order for Payment of Money, or Delivery of Goods.* - - - § 37.

It must be by one having or claiming Authority to command, and not merely a Request. *ib.*

But sufficient if it so purport to be, though in Truth he had no such Authority. - - § 38.

And

And though made in a fictitious Name. *ib.*

An Order in general Terms is sufficient, without specifying the particular Goods or Sum of Money; if intelligible to those to whom addressed. - § 39.

As "to deliver my Work," &c. *ib.*

So an Order for Payment of "all my Proportion of Prize Money," &c. *ib.*

The Statutes extend to Instruments of other specific Denominations, if in legal Effect *Warrants*, *Orders*, &c. as Bills of Exchange, &c. - - § 40.

Not confined to Commercial Transactions. - § 41.

Extends to Orders for Seamen's Pay, &c. *ib.*

By Stat. 41 Geo. 3. c. 57. counterfeiting, &c. certain *Moulds* for certain *printed Forms* or *Paper* of a particular Description *used by Bankers*, &c. in their *Bills*, *Notes*, &c. or using the same, &c. or publishing such Notes, &c. knowingly; Misdemeanors: and for 2d Offence, Transportation. - - § 42.

IV. *How far the Validity in Law of the Thing forged, supposing it were true, is essential to Forgery.* § 43.

Sufficient if it purport on the Face of it to be such a true Instrument or Writing, of which Forgery may be committed.

As the Forgery of a Protection in the Name of one as a Member of Parliament who was not so. *ib.*

Of a Conveyance of an Estate by a wrong Description. *ib.*

Of the Will of a living Person. *ib.*

Of the Instruments of Persons who had no Existence. *ib.*

What Degree of Similitude between the counterfeit and true Instrument is sufficient. - - § 44.

It must have the essential Requisites of the true Instrument; but sufficient if calculated to impose on Persons in general. *ib.*

How the Counterfeit must tally with the Description of the particular Instrument alleged in the Indictment to be forged. - - - - § 45.

A Bill of Exchange directed to J. *Ring* and accepted by J. *King* cannot be laid as *purporting* to be directed to J. *King* by the Name of J. *Ring*. *ib.*

But

But Indictment for forging Will of P. P. good, though the Will which began "I P. P." &c. concluded with the Signature of *J. P.* - - § 45.

But if the Instrument, if genuine, would be illegal and void on the Face of it, as where a forged Will of Lands was only attested by two Witnesses, being presumed to be freehold, (the contrary not appearing), and therefore void by Stat. of Frauds, held no Forgery as of a Will. *ib.*

So where a Bill of Exchange for less than 5*l.* had not the Requisites enjoined by Stat. 17 Geo. 3. c. 30. without which it was declared void. *ib.*

Aliter in case of Forgery of a Bill of Exchange on unstamped Paper. *ib.*

Or where the Instrument is only avoidable by collateral Evidence dehors, but good on the Face of it. *ib.*

V. *How far using a fictitious Name, or personating the true Man or fictitious Character assumed at the Time, will affect the Offence.* - - § 46.

Forgery may be committed in the Name of a non-existing Person. *ib.*

As of a Power of Attorney to receive Prize-Money in the Name of a supposed Representative of a deceased Seaman. *ib.*

So of Bills of Exchange drawn or indorsed in fictitious Names. *ib.*

Immaterial whether any additional Credit be gained by the Forgery; as where a Party unknown indorsed a Bill in a different Name as for his own. § 47.

Or where one in like Manner signed a Receipt to the Drawee for the Contents of a Bill, made payable to Order, and indorsed in Blank. *ib.*

But where the Credit is given to one *personally*, said to be no Forgery if he give a Security for it in a fictitious Name as for his own: (sed Qu. if done fraudulently? post.). Aliter, where he thereby gains a superior Credit, or induces a Trust which would not otherwise be bestowed. - - - § 48.

Or

Or as it seems, if he used such other Name the better to deceive and defraud, and elude Responsibility. § 48.

Giving Security in Name of another real Person, whom the Party assumes to be, is Forgery. - § 49.

Although the Party's own Name happened to be the same. As where one indorsed a bill payable to the Order of another of the same Name, knowing that he was not the Person intended. *ib.*

Or where one, having authorized another to draw a Note in his own Name, afterwards passed it off as another's. *ib.*

Aliter where one only assumed to be the real Indorser, though for the Purpose of Fraud. *ib.*

But personating others for fraudulent Purposes punishable capitally by Statute in certain Cases. *Post.*

Assuming to be the supposed Character in whose Name the Forgery is committed. - - § 50.

Giving a Banker's Draft in a fictitious Name as for the Party's own, but with a false Description of Place of Abode to elude Responsibility, Forgery. *ib.*

Q. Where the Party at the Time he gave the Note gave his true Place of Abode, and had taken the House in the assumed Name a Month before; though he assumed it for the Purpose of Fraud. *ib.*

VI. *What a publishing or uttering.* - § 51.

Every Manner of exhibiting the Instrument as a true one, with Knowledge of its being forged.

This Offence distinct from the Act of Forgery.

VII. *Assisters and Accessaries.* - § 52.

At Common Law all are Principals in Forgery.

Aliter under the Statutes creating it Felony.

VIII. *Indictment and Evidence.* - § 53.

Indictment must set forth forged Instrument in *Words* and *Figures*. *ib.*

But setting it forth "as follows" is the same as "according to the *Tenor* following." *ib.*

Indictment, setting forth the *Tenor* of the Note forged, sustained by Proof that the Attestation of the Witness, and the Words "M. W. her Mark" set forth, were added after the Party had signed the Note, but on the same Occasion. - - § 53.

And sufficient to set forth the Thing forged, as a Receipt, which purports to be such on the Face of it, without setting forth the Instrument to which it has Relation or Reference. *ib.*

Aliter where in itself it did not purport to be a Receipt; in which Case it must be shewn how it operated as such by proper Averments. *ib.*

A literal Variance, as writing "Value *received*" for "Value *receivd*," evidently meaning the same word, will not vitiate. - - § 54.

Where *true* Instrument *in Part altered*, it may be laid as a Forgery of the *Whole*. - - § 55.

Charging Forgery of a *Paper writing purporting* to be such an Instrument as the Statute described is good. § 56.

But the forged Paper must *on the Face of it* purport to be as described. *ib.*

Describing a Bill as *purporting* to be directed to J. K. by the Name of J. R., or to R. D. &c. by the Name of Messrs. D. &c. bad. *ib.*

Stating a Bill of Exchange *to be signed* by H. H., instead of only *purporting* to be so signed, is bad, if the Signature appear to be forged. *ib.*

What *technical Words* necessary in laying Forgery at Common Law. - - - § 57.

Indictment must bring Offence within the descriptive Words of the Statute. - - § 58.

But *superfluous Description* does not hurt; as describing a Bond to be a Bond *and* Writing-Obligatory. *ib.*

And charging that one *altered* a Bill of Exchange *by falsely making*, *forging* and adding a cypher, &c. is good, though the Statute has the Words "if any Person shall *falsely make*, *forge*, &c. *ib.*

So a *Variance* in immaterial Words of a Statute does not hurt; as stating a Duty to be chargeable *for*, *on*,

on, and in respect of Muslin; the Statute imposing it *for and upon*, &c. - - - - § 58.
But alleging that Defendant forged *or* caused to be forged, &c. bad for Uncertainty. *ib.*
Indictment must state *Intent to defraud*, and *whom*. § 59.
Offence created, with Intent to defraud *a Person*, not sustained by Charge or Intent proved to defraud a *Corporation:* But this now remedied by Statute 18 G. 3. c. 18. in certain Cases. *ib.*
Indictment need not state how the Party charged was to be defrauded, which is Matter of Evidence. *ib.*
But sufficient to allege the Forgery of the Thing prohibited, and that it was with Intent to defraud such an one.
How the *Parties* to be described against whom the Offence is committed; particularly in Case of Partnership Firms, and public Bodies. - § 60.
What Proof required of Forgery in the particular *County*. - - - - - § 61.
IX. *As to the Competency of the Witnesses to the requisite Facts*. - - - - - § 62
Persons *interested* in avoiding an Instrument not competent to prove the Writing forged. - § 63.
Though by collateral Evidence disproving the Hand-Writing. - - - - - § 64.
How far competent to prove other collateral Facts. § 65.
As Identity, or Non-existence of the Person whose Name is alleged to be forged. *ib.*
Where the Interest of the Party is removed by Payment of the Security, or Settlement of the Account outstanding against him on Account of the Forgery, his Competency to prove his Hand-Writing forged is restored. - - - - - § 66.
So the Party is competent who never had an Interest: as in case of Forgery of a Will of a living Person, or of Vouchers in his Name for the Purpose of imposing on third Persons with whom he had no Concern. § 67.

How

How far one who is a bare *Trustee*, acting in the Name or for the Benefit of another is a competent or necessary Witness to prove the Forgery of his Hand-Writing. - - - - § 68.
In all Cases a *Release* restores the Competency of a Witness otherwise interested. - § 69
X. *Judgment and its Consequences.* - § 70.

Forgery.

§ 1. *Definition.* *Vide* 3 Inst. 169.

TO *forge*, (a metaphorical expression borrowed from the occupation of the smith), means, properly speaking, no more than to *make* or *form:* but in our law it is always taken in an evil sense; and therefore *Forgery* at common law denotes a *false* (*a*) making [which includes every alteration of or addition to a true instrument], a making *malo animo*, of any written instrument for the purpose of fraud and deceit. This definition results from all the authorities ancient and modern taken together. The more early writers on the Crown Law seem to have fettered their definitions of the nature and principle of the offence with its application to the particular species of instruments alone to which the experience and necessity of their own times had extended it: these, which I shall presently advert to, were either public instruments or deeds. But they all consider the offence as consisting in the false and fraudulent making or altering of such and such instruments. Lord Coke indeed seems to confine it in strictness to an act done *in the name of another*, but this was long ago agreed in Anne Lewis's case to be too narrow a definition. Hawkins says, that the notion of forgery does not seem so much to consist in the counterfeiting a man's hand and seal, as in endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation

Brit. 16. Fleta, lib. 1. c. 22. and lib. 2. c. 1. s. 9. *Vide* Pult. 43. b. &c. 3 Inst. 169. 1 Hawk. ch. 70. s. 1. &c. Post. s. 7.

Lewis's case, Fost. 117. Post. s. 46. 1 Hawk. ch. 70. s. 2.

(*a*) Forgery is known in the civil law under the denomination of *crimen falsi*.

which

Ch. XIX. § 1. *Definition.*

which in truth and justice it ought not to have. He however, like others before him, limits the application of the offence to certain instruments, though he adds *wills* to the list given by former writers. As experience grew, and the true principle of the offence became more considered and better understood, more modern definitions have taken a larger scope. Mr. Justice Blackstone says, that forgery is "the fraudulent making or alteration of a writing to the prejudice of another's right." In Coogan's case Buller J. said, it is "the making a false instrument with intent to deceive;" as Eyre B. in Taylor's case, defined it to be "a false signature made with intent to deceive." In the word *deceive* must doubtless be intended to be included an intent to *defraud;* and so it was defined by Grose J. in delivering the opinion of the judges in the case of Parkes and Brown; viz. the false making a note or other instrument with intent to defraud. Again, Eyre B. in the case of Jones and Palmer defined it to be "the false making an instrument, which purports on the face (*a*) of it to be good and valid for the purposes for which it was created, with a design to defraud," &c.

4 Blac. Com. 247. and *vi.* post. 861.

Coogan's case, Mich. term 1787, post. s. 43.

Taylor's case, coram Justs. Nov. 1779, MS. Buller J. Post. s. 47.

Parkes and Brown's case, O. B. Dec. 1797. 2 Leach, 910. Post. s. 50. and *vi.* Obrian's case, 2 Sess. Cas. 369.

Jones and Palmer's case, O.B. 1785, 1 Leach, 405.

Punishment.

The offence is punishable as a misdemeanor at common law. But it has been enhanced in such a variety of instances by different statutes, upon which it is now most usual to prosecute, that a compendious view of these, explained by adjudged cases, and illustrated by the principles of the common law, forms the principal subject for consideration upon this head of criminal jurisprudence. For this purpose I shall endeavour to class them under appropriate heads; taking care, whilst brevity is consulted in this respect, to preserve not only the substance, but in every material part the very words, of these statutes. I must premise however that as the Legislature in many of these acts have treated the offence of false personating others for fraudulent purposes in the same light as forgery strictly so called, and as the offences bear a close affinity to each other, often making parts of the same plot of deception, I shall for the present class them together as they occur; though there will be a separate reference to the offence of false personating in the ensuing chapter.

1 Hawk. ch. 70. s. 1. 4 Blac. Com. 247. 3 Bac. Abr. 277. Post. s. 70.

(*a*) This must be understood in respect of the frame or terms of the instrument or writing itself, and not of any other collateral matter, as a *stamp. Vide* post. s. 45.

I pro-

Ch. XIX. § 2. *General division of the subject.*

I proceed now to consider the subject as it falls properly under one or other of these inquiries;

1. *With what intent the act must be done.*
2. *What false making, insertion, alteration, or erazure, amounts to forgery.*
3. *Of what things forgery may now be committed.*
4. *How far the validity in law of the thing forged, supposing it were true, is essential to forgery. Wherein is also to be considered what degree of similarity is required between the counterfeit and the true instrument.*
5. *How far using a fictitious name or personating the true man or fictitious character assumed at the time will affect the offence.*
6. *What is a publishing or uttering.*
7. *What shall make a person assisting or accessary.*
8. *Some general rules touching the manner in which the offence is to be laid in the indictment and proved in evidence.*
9. *As to the competency of the witnesses to the fact.*
10. *Judgment, and its consequences.*

I. *With what intent the act must be done.*

Intent.
Ante, s. 1.
1 Hale, 683.
3 Bac. Abr. 278.
MS. Burnet.
Post. s. 32.
1 Hawk. ch. 70. s. 4. 11.
Noy. 99.
Moor, 619. 655.
Salk. 375.
3 Bac. Abr. 279.
Vide Tatlock v. Harris, 3 Term Rep. 181.

The deceitful and fraudulent intent appears from the definitions before given of this offence to be of the essence of it: this is indeed particularly expressed in the statute 5 Eliz. c. 14. and in most if not all the other acts. Therefore one who rased out the word *libris* in a bond made to himself and put in *marcis* was adjudged not guilty of forgery; because there was no appearance of a fraudulent design to cheat another. But at any rate it is very dangerous to tamper in these matters, besides the consequence of vacating the security altogether. And it is said that it would be forgery if it any way appeared to be done with a view of gaining an advantage to the party himself, or of prejudicing a third person.

Bigg's case, 3 P. Wms. 119.

Yet it was holden no objection to a special verdict that the forgery was found not to have been committed for the sake of lucre or to defraud the party.

R. v. Ward, 2 Ld. Ray. 1466. post. s. 7.

But in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it.

II. *What*

II. *What false making, &c. is sufficient.*

§ 4.

The very making, with such fraudulent intent and without lawful authority, of any instrument which at common law or by statute is the subject of forgery, is of itself a sufficient completion of the offence even before publication, and of consequence before any actual injury sustained: for though publication be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. And by the statute law the publication, with knowledge of the fact, is for the most part made a substantive offence.

Vide 1 Hawk. ch. 70. s. 27. Elliot's case, post. s. 44. R. v. Goate, 1 Ld. Ray. 737. R. v. Ward, 2 Ld. Ray. 1469.

Forgery may even be committed by a party's making a false deed in his own name; as if he make a subsequent deed of feoffment, as of a date prior to a former deed of his own, conveying the same lands, thereby attempting to give the last an operation which in justice it ought not to have, in order to defraud his own feoffee.

1 Hawk. ch. 70. s. 2. 3 Inst. 169. Fost. 117. 1 Hale, 688. Pult. 47. b. 27 H. 6. 3. Moor, 655.

So if a bill of exchange payable to A. or order get into the hands of another person of the same name with the payee, and such person, knowing that he is not the real payee in whose favour it was drawn, indorse it for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. So if one put off a note subscribed with his own name as the note of another, it is a false uttering and publishing within the statute.

Mead v. Young, 4 Term Rep. 28.

Brown's case, post. s. 49.

Making a fraudulent insertion, alteration, or erasure, in any material part of a true instrument, although but in a letter, and even if it be afterwards executed by another person, he not knowing of the deceit; or the fraudulent application of a true signature to a false instrument for which it was not intended, or vice versâ; are as much forgeries, as if the whole instrument had been fabricated; for any such alteration gives it a new operation. As by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated.

1 Hawk. ch. 70. s. 2. 4, 5. 3 Inst. 169, 170, 1. 1 Hale, 683, 4, 5. Dawson's case, post. s. 55. 1 Stra. 18. Puckering's case, 1 Ander. 100. Teague's case, post. s. 55. Master v. Miller, 4 Term Rep. 320.

Expunging an indorsement on a bank note with a certain liquor (lemon juice) unknown to the jury was holden a rasing within the act, 8 & 9 W. 3. c. 20.

R. v. Bigg, 3 P. Wms. 419. Ld. King's MS. 98. post. s. 11.

Samuel Kinder procured a deed to be forged as from one J. Moore and his son, conveying a certain estate for life to

Kinder's case, Nottingham Sum. Ass. 1800, MS. Jud.

and Mich. Term following.

Mary

Ch. XIX. § 4. *What a false making or altering.*

Mary Kinder, and after the death of one of the supposed grantors he procured the forged deed to be altered by enlarging the grantee's estate to a fee; and was indicted and convicted for forging and uttering it in the state to which it was so altered; and held well by all the Judges; for it was no less a forgery after than before such alteration.

Vi. post. s. 55.

1 Hawk. ch. 70. s. 2. 6. Moor, 760. Noy, 101.

So the wilful insertion of a legacy in another's will unknown to him prior to and at the time of its execution is a forgery. But a bare nonfeasance or omission is said not to be such: as by omitting a legacy out of a will which one is directed to draw for another; unless as some have holden such omission makes a material alteration in other parts of the will: as where by the omission of a prior life estate to A. a present fee is passed to B., instead of a remainder as was intended.

§ 5. *Assuming to be the party to a true instrument.*

In all cases the thing made must be false; for certainly a man cannot be guilty of forgery merely by passing himself off for the person whose real signature appears, although for the purpose of fraud, and in concert with such real person; for there is no false making. But this appears to be a false pretence within the stat. 30 Geo. 2. c. 24.

Ante, 827.

Hevey's case, O. B. Jan. 1782, MS. Crown Cas. Res. 125. and MS. Buller J. (1 Leach, 268. S. C.)

It is not forgery to pass for the person whose indorsement is on a bill, and thereby to obtain credit in the name of another.

John Hevey was indicted for that he having in his custody a bill of exchange with the name "Jer. Connell" thereunto subscribed, purporting to bear date 19th Nov. 1781, and to have been drawn by one Jer. Connell for Smith, Moore, and Co., and directed to Richard Beatty and Co. London, for the payment of 30*l.* to one Barnard M'Carty or order, thirty-one days after sight, the tenor of which said bill is as follows:

"No. 59. £. 30. Bath Bank, Nov. 19th, 1781.
"Thirty-one days after sight pay Mr. Barnard M'Carty
"or order £. 30 value received.
"For Smith, Moore, and Co.
"To Richd Beatty and Co. Jer. Connell.
"London.
"No. 19. Great St. Helen's."

on, &c. feloniously did forge, &c. upon the back of the said bill of exchange an indorsement in the name of the said Barnard M'Carty, and which purported to be an assignment of the said bill of exchange by and under the hand-writing of

of the said B. M'Carty, viz. "Barnard M'Carty," with intent to defraud William Masters and Edward Beauchamp, &c. 2d Count for uttering and publishing the said indorsement with the like intent. It appeared in evidence that the prisoner came to the shop of Beauchamp and Masters, pawnbrokers, to buy a watch, and offered the bill in question with the indorsement then written on it. They hesitated about taking of it; but the prisoner told them it was a good bill, that his name was Barnard M'Carty, and he had indorsed it, and that Beatty and Co. by whom the bill purported to be accepted were agents to the Bath bank. The pawnbrokers, still doubting, sent their servant to St. Helen's, to inquire whether it were a good acceptance, and he being told that it was by a man whom he saw there, on his return the prosecutors let the prisoner have the watch, and gave him the difference of the bill. It further appeared that the prisoner had procured the plate to be engraved some time before, containing the form of the bill in question, and had printed several hundred copies. That he had always been known by the name of John Hevey. That no such person as Smith, Moore, and Co. could be found in Bath; though there were such names put on the door of a house, but the person who had been there had ran away. There were also the names of Beatty and Co. on a counting-house door in Great St. Helen's, and a man of the name of Beatty had lived there who said he was a clerk, but he was since taken up and lodged in prison. It further appeared that there was such a man as Barnard M'Carty, and that the indorsement was in fact of his hand-writing. Ashhurst J. directed the Jury, that if they thought there was no such person as Barnard M'Carty, or that the indorsement was not his handwriting, they must of course find the prisoner guilty. But even if they were satisfied of those facts, yet if they thought that the prisoner was not that person, but passed himself upon the prosecutors as such, they should find him guilty, and he would save the case for the opinion of the Judges, whether in point of law it were forgery. The jury found the prisoner guilty, and the facts that there was such a person existing as Barnard M'Carty, and that the indorsement was of his hand-writing; but that the prisoner was not that person, but had passed himself upon the prosecutors as such at the time he tendered the bill in payment. In Hilary term 1782

Ch. XIX. § 5. *What a false making or altering.*

all the Judges were of opinion that the case did not amount to forgery; for there was no false indorsement; the jury having found that the indorsement was truly made by a real person whose name it purported to be (*a*).

§ 6. *Resemblance to the true writing need not be perfect.* *vi.* 1 Hale, 184. Ante, 86. 163. Elliot's case, post. s. 44.

In all cases however it is to be observed that where the forgery consists in counterfeiting any other known instrument, it is not necessary that the resemblance should be an exact one: if it be so like as to be calculated to deceive where ordinary and usual observation is given, it seems to be sufficient. The same rule holds in cases of counterfeiting the seals and coining. Therefore though the word *pounds* and the water-mark words "*Bank of England*" were omitted

(*a*) The prisoner was afterwards at the O. B. Feb. 1782, before Serjt. Adair, Recorder, indicted with his associates Richard Beatty and Bryan M'Carty, for a conspiracy to defraud, and they were all convicted. The indictment there charged that the Defendants fraudulently and unlawfully conspired that Richard Beatty should write his acceptance to a certain paper-writing purporting to be a bill of exchange, &c. (the tenor of which was set out as before) in order that John Hevey might by such acceptance, and of the name B. M'Carty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange truly drawn at Bath by one Jer. Connell, for Smith, Moore, and company, as partners in the business of bankers under the style of *Bath Bank*, as persons well known to them the said Defendants, and thereby fraudulently to obtain from the king's subjects goods and monies. That Richard Beatty, in pursuance of such conspiracy and agreement, *did* fraudulently and unlawfully *write his acceptance* to the said paper-writing to the tenor following; viz. Accepted 20th Nov. 81. K. B., well knowing the firm of Smith, Moore, and company to be fictitious. That the Defendants procured the indorsement "B. M'Carty" to be written on the same; and that the said John Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to S. Read, as and for a good bill of exchange, truly drawn, &c. and accepted by the said Richard Beatty as a person able to pay the said sum of 30*l.* in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value 12 guineas, and 7*l.* 8*s.* in money. Whereas in truth at the time of drawing, accepting, and uttering the said bill there were no such persons as Smith, Moore, and company in the business of bankers at Bath, and the said Richard Beatty was not of sufficient ability to pay the said 30*l.* they the Defendants well knowing the same, &c. whereby they defrauded the said S. Read of the said goods and monies—All the facts charged were fully proved, except that no other evidence was given either of the fact of writing the acceptance or of the hand-writing of Richard Beatty than by a witness who proved that the bill, *with the acceptance written upon it*, was shewn to Richard Beatty, who, being asked whether it were a good bill? answered that *it was very good*. A question was thereupon, after conviction, reserved for the opinion of the Judges, Whether this evidence supported the allegation in the indictment that Richard Beatty *wrote the acceptance?* And in Easter term 22 G. 3. all the Judges were of opinion that it was proper evidence to be left to the jury, on which they might found their verdict that Beatty wrote the acceptance. MS. Gould and Buller Js. and MS. Jud.

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in the body of a forged bank note, the paper of which was also thicker than ordinary, yet as it resembled a true note in other respects, it was holden to be sufficient. The further consideration of this question will be resumed in another place. Ch. XIX. § 6. *What a false making, &c.* *Vide* R. v. Jones, post. s. 11. post. s. 44.

III. *Of what Instruments, &c. Forgery may be committed.*

1. At common law. 2. By statute.

§ 7.

1. To what instruments the crime of forgery was applied at common law seems to have been very indistinctly marked. It was never doubted but that it extended to the falsification of records, and other instruments of a public nature; as a parish register, a privy seal, a licence from the Barons of the Exchequer to compound a debt, a certificate of holy orders, a protection from a member of parliament, or the like. It is equally clear that it extended to private deeds or instruments under seal; and as Hawkins and other writers think to wills also, by a parity of reasoning; though he admits that he does not find the point any where directly holden. And it is no matter of surprise to find so able a writer treading with so much caution in a path, now indeed too well beaten, but which previous to the time of the Revolution, when paper securities became much more common, had been but little explored. The few occasions which occurred in early times of transferring property by written instruments from one to the other were for the most part under seal. It was the most easy and practicable method when few persons among the laity could write, and therefore it was natural enough for the first writers on this subject to adapt the language of their definition to the common experience of the times. But such a distinction never appears to have been solemnly adopted; and the subject having since undergone much deeper and more frequent consideration, the modern definitions which have been before given are better adapted to the nature and principle of the offence, and to the prevention of its pernicious consequences to society. The last-mentioned writer stopped short even of the experience of his own and former times, when he proceeds to say that it seems to have been generally laid down as a rule that the counterfeiting of writings of an inferior nature (to deeds and wills) is

At common law. Ante, s. 1. 3 Inst. 168, 9. 1 Hawk. ch. 70. s. 8, 9, 10. 1 Roll. Abr. 66. 2 Sid. 71. 3 Bac. Abr. 277. 9.

Vide 2 Stra. 749.

Ante, s. 1.

1 Hawk. ch. 70. s. 11.

not

Ch. XIX. § 7. *Of what writings at common law.*

not properly forgery: but it appears that he was not satisfied with the authorities to which he refers in this respect, nor with the principal reason on which they were founded, namely, that such writings were of a private nature; a reason which, as he justly observes, would apply as well to deeds. And not being able to satisfy himself upon the subject, he suggests a distinction to be made between the counterfeiting of such writings (i. e. under seal, and public documents) as is allowed to be forgery properly so called, and the counterfeiting of other inferior writings; that the former is in itself criminal, whether any third person be actually injured thereby or not; but that the latter is no crime unless some one receive a prejudice by it. But however plausible this may be, it is by no means a solution of the difficulty. It is a mere conjecture which leaves the crime of forgery as indistinct in principle as before; and tends to confound it with the general class of cheats, the distinction between which was well settled in Ward's case. It was there shewn to be immaterial to the offence of forgery, properly so called, whether any person were prejudiced or not, provided any might have been prejudiced. But that to constitute a cheat properly so called, there must be a prejudice received, both at common law and under the statutes of 33 H. 8. c. 1. and 30 Geo. 2. c. 24. But further, it does not appear upon full consideration of the books to which Hawkins refers that it is any where adjudged, or is even generally laid down, that the counterfeiting of writings of any sort, whereby any person may receive a prejudice, if done *lucri causâ* or *malo animo*, is not punishable as forgery. The authorities referred to by him are all cases of actions for slander; many of them contradictory, and some since expressly denied to be law; all of them prior to Ward's case, where the general result of the authorities on this subject was plainly shewn to be against such a conclusion. But even with respect to those books which seem at first sight most strongly to warrant the notion that writings of an inferior nature, such as letters, are not the subjects of forgery at common law, if fairly considered and compared, they amount to no more than this, that the imputation of counterfeiting letters or writings *frivolous*, or *of no moment*, or *from whence no damage could ensue*, or *of uncertain signification*, is not actionable. In none of these instances to be sure would the crime

Ward's case, post. 861.

Vide ante, 825.

Vide 3 Bac. Abr. 280. 13 Vin. Abr. 460. and 1 Rol. Abr. 66. Trem. P. C. 100.

Vide 3 Bulstr. 265. 1 Roll. Rep. 431.

crime amount to forgery; but it is plain that the objection would be to the substance, and not to the form of the writing; for the fraud and intention to deceive constitute the chief ingredients of this offence. And the very qualifications introduced afford some presumption against the generality of the rule supposed to be deducible from those authorities. But the following case has now settled the rule, that the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law.

3 Bac. Abr. 278.

Rex v. John Ward, Hil. 13 Geo. 1. 2 Ld. Ray. 1461. 2 Stra. 747.

Forging an order from one, to charge certain goods contained in a schedule to his account, and to appropriate part of the proceeds to the Defendant's own use, &c. done with intent to defraud the principal, is forgery at common law, though the fraud were not effected.

An information was filed by the Attorney-General charging that the Defendant Ward being bound to deliver 315 tons and a quarter of alum of the value of 1000*l.* to the Duke of Buckingham at a certain day then past, he the Defendant wickedly contriving and intending the said Duke of the said allum to deceive and defraud, and with a wicked and fraudulent intent to avoid the delivery of the said alum on, &c. at, &c. with force and arms upon the back of a certain certificate in writing signed by one A. N. falsely forged and counterfeited and caused to be forged and counterfeited a certain writing in the words and figures following:

"Schedule

Tons.	C.
660	5
315	5
976	10

Mr. John Ward. I do hereby order you to charge the quantity of 660 tons and 1 quarter of alum to my account, part of the quantity here mentioned in this certificate; and out of the money arising by the sale of the alum in your hand pay to Mr. W. Ward and yourself 10*l.* for every ton according to agreement; and for your so doing this shall be your discharge. Buckingham. April 30th, 1706." To the evil example, &c. to the great damage of the said Duke and against the peace, &c. A second count charged him with publishing the same forged writing knowing it to be forged, &c.

After conviction it was moved in arrest of judgment that the instrument set forth was not the subject of forgery at common law; but at most the offence was only punishable as a cheat, and not in this form; being merely a thing of a private nature, and in effect nothing more than a letter: and if the counterfeiting of a letter had been punishable as a forgery at common law, then the making of the stat. 33 H. 8. c. 1. to punish those who got the money

or

Ch. XIX. § 7. *Of what writings at common law.*

or goods of others under colour of false tokens or counterfeit letters was nugatory. That it no where appeared that the Duke had been prejudiced by this; which, if he had, it might have been indictable as a cheat, but not as for forgery at common law. But all the Court held that this was indictable as a forgery at common law. That none of the books confine the offence to the particular kinds mentioned in 3 Inst. 169. and that as forging a writing not sealed came within all the mischief of forging a deed, the maxim applied, ubi eadem est ratio eadem est lex. That this was recognized in the preamble of the stat. 5 Eliz. c. 14. which recites that the forging of *writings* as well as of *deeds* was punishable by law before that statute, but that offenders had been encouraged by the too great mildness of the punishments; and that the stat. 33 H. 8. c. 1. did not create new offences, but only enhanced the penalty where the fraud was executed. They also referred to several instances of indictments at common law for forging instruments not under seal; as a bill of lading (*a*), an acquittance (*b*), a warrant of attorney (*c*), a marriage register (*d*), a bill of exchange (*e*), letters of credit to gather money (*f*), and others of a similar kind (*g*). And they distinguished this offence from cheats at common law, and upon the stat. 33 H. 8. c. 1. where the party received an actual prejudice, which was not necessary to constitute forgery; it being sufficient if the party might be prejudiced by it.

Sed *vide* ante, 833, 4.

Fawcett's case, York Spring Assizes 1793, MS. Buller J. and MS. Jud. *One who was committed to gaol under an attachment for a contempt in a civil cause counter-*

Leander Fawcett, who was confined in the gaol of York under an attachment issued out of the Court of B. R. for a contempt, (but not for non-payment of money) which was indorsed "*By rule of Court for contempt, Dawson ex parte "Fawcett,*" was tried before Buller J. at York on an indictment framed as for a misdemeanor at common law; which charged in substance that A. Dawson had prosecuted a writ

(*a*) R. v. Stocker, 5 Mod. 137. 1 Salk. 342. 371. The indictment was quashed for uncertainty in the form: but the offence was not denied to be forgery.
(*b*) R. v. Ferrers, 1 Sid. 278. Trem. Entr. 129.
(*c*) Farr's case, T. Ray. 81. (*d*) Dudley's case, 2 Sid. 71.
(*e*) R. v. Sheldon, H. 34 Car. 2 Roll. 35.
(*f*) Savage's case, Stiles, 12.
(*g*) *Vide* R. v. Hales and Kinnersly, 9 St. Tr. 77. and ib. 93. R. v. Gibson, 1 Sess. Cas. 428. and ib. 432. for forging promissory notes, and indorsements; and *vide* also in general 13 Vin. Abr. 460. Trem. P. C. 100. 2 Show. 20. Obrian's case, 7 Mod. 378. 2 Sess. Cas. 366. 2 Stra. 1144.

of

of attachment out of B. R. directed to the sheriff of York, whereby he was commanded to attach the Defendant, which writ was delivered to the sheriff, and by virtue of which he arrested the Defendant; and that the sheriff by his warrant committed him to the custody of the gaoler; by virtue of which writ and warrant he was conveyed and detained in gaol for the cause expressed, there to remain until he should be thence discharged by due course of law. That the Defendant contriving the due course of law to hinder and pervert, and by false means, &c. to procure his discharge and effect his escape, &c. on the 26th of February, 33 Geo. 3. with force and arms at, &c. did forge, &c. a certain writing purporting to be signed in the name of the said A. Dawson, &c. and to contain his authority to the sheriff for the Defendant's discharge, &c. as follows: "To the high sheriff "of the county of York, his deputy, &c. and gaoler.—As "to any writ, attachment, or any other process or cause "whatsoever at the suit instance or promotion of me A. "Dawson, by reason whereof Leander Fawcett is now de- "tained a prisoner in your custody, you may forthwith dis- "charge and set at liberty him the said L. F. unless detained "at the suit of some other person; and for so doing this "shall be your warrant and indemnity. (Dated) 26th Feb. "1793. (Signed) A. Dawson," and witnessed by one R. W. That the Defendant further contriving to complete his evil purpose, unlawfully wickedly and falsely did forge, &c. a certain other writing purporting to be an affidavit subscribed and sworn by one R. W. (the witness to the above order) before one J. P. one of the commissioners appointed for taking affidavits in B. R. &c. of the following tenor, (setting forth an affidavit of the execution of the before-mentioned order): whereas in truth and fact the paper-writing in the said supposed affidavit mentioned was not the hand-writing of the said A. D. nor by him subscribed, nor the words "R. W." subscribed as witnessed thereto, nor the name R. W. &c. subscribed to the said supposed affidavit, the hand-writing of the said R. W. And then it proceeded to charge that the Defendant produced and shewed the said several false forged and counterfeited writings to the then deputy sheriff of the said county, and that the Defendant by colour and pretence of the forged order and affidavit falsely

feited a pretended discharge as from his creditor to the sheriff and gaoler, under which he obtained his discharge from gaol. Held a misdemeanor at common law; although the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge: and semble also indictable as a forgery.

Ch. XIX. § 7. *Of what writings at common law.*

falsely knowingly and deceitfully obtained his discharge from imprisonment, and thereby effected his liberation out of the gaol, &c. in contempt, &c. There was another count in substance the same, for publishing the said order knowingly, &c. and thereby obtaining his discharge.

The Defendant was convicted, and the following questions were reserved for the opinion of the Judges; 1. Whether the order were a matter of such a public nature that the counterfeiting of it would be a forgery at common law. 2. Whether, as the attachment was not for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorised to discharge the prisoner under it. 3. Whether upon this indictment the prisoner could be convicted of an offence within the stat. 5 Eliz. c. 14. s. 3. 4. Whether if he could be so convicted, the punishment prescribed by that section of the statute is so far specific that it must necessarily be directed by the sentence. Upon the conference in Easter term 1793, the cases of Ward and Dickins were cited. Lord Kenyon C. J. and Eyre C. J. said that there was an injury to a third person, and that it was an interruption to public justice; but the latter thought it was not a forgery, but a cheat. The matter was adjourned to Trinity term, when Eyre C. J. was still not satisfied as to the forgery; though he thought the indictment good as for a cheat. But all the Judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority (*a*) also thought it was forgery at common law.

Ante, 861.

R. v. Gibbs, 1 East. R. 173.

In the subsequent case of Micah Gibbs an objection of a similar kind was started upon the absolute nullity of the writing (*b*) alleged to be counterfeited, supposing it to have been genuine: but no opinion was given on that point; as taking it to be a forgery, the sessions where the indictment was found, had no jurisdiction of it.

2. *By*

(*a*) Mr. Justice Buller's MS. only makes a quære as to the opinion of Eyre C. J. But it appears from other MSS. as well as his own, that the Judges all concurred to sustain the conviction on the general ground only before mentioned.

(*b*) The indictment there charged that the Defendant being a person assessed to certain duties granted upon income by certain commissioners; and under pretence of being aggrieved, having appealed to certain other commissioners, and intending to deceive the commissioners of appeal, and to induce

2. *By Statute.*

The statutes relating to forgery may be distributed into several classes; as they relate,

§ 8.
By statute.

1. *To Records.*
2. *To the public Funds and the Stocks of public Companies.*
3. *To Notes and other Securities of the Bank of England and other public Companies.*
4. *To Stamps.*
5. *To official Papers, Securities, and Documents.*
6. *To private Papers, Securities, and Documents.*

§ 9. *a Records.*

1. By stat. 8 Hen. 6. c. 12. s. 3. "If any record or parcel of the same writ, return, panel, process, or warrant of attorney in the King's Courts of Chancery, Exchequer, the one bench, or the other, or in his Treasury, be willingly stolen, &c. or *avoided* by any clerk or by other person; because whereof any judgment shall be reversed, such stealer, &c. or *avoider*, their procurators, counsellors, and abettors, thereof indicted and duly convicted by their own confession or by inquest," (half of whom are to be officers of any of the same courts, and the other half common jurors) "shall be guilty of felony." The inquiry is also thereby directed to be made by the judges of the said courts of the one bench or the other: which together with other matters of construction on this statute, so far as the same relates to stealing as well as avoiding such records, has been already mentioned in another place. This statute does not extend to the judges, clerks who are inferior to them being first named; but they as well as clerks are by the stat. 8 Ric. 2. c. 4. to pay a fine to the King, and make satisfaction to the party "for falsely entering pleas, or rasing rolls, or changing verdicts to the disherison of any one." Besides which it is clear that all offences of this nature, whether committed by means of forgery or otherwise, tending to

8 H. 6. c. 12. *Vide* ante, tit. Larceny, p. 596. the same statute at length.

1 Hawk. ch. 45. s. 4.

induce them to believe that the particulars of his income delivered in and the deductions claimed by him to be allowed had been inquired into, examined and approved by one R. Else, the clerk to the first named commissioners, and with a fraudulent intent to give effect to his appeal, and to evade the duty, at the bottom of a paper purporting to be a schedule of the Defendant's income, did forge, &c. the letters R. E. purporting to be the initials of the said clerk, and did exhibit to the commissioners of appeal the said paper, &c. against the peace, &c.

Ch. XIX. § 9. *By statute, of records.*

avoid or interrupt the course of justice, are high misdemeanors at common law.

1 Hawk. ch. 45. s. 5. 3 Inst. 72. 2 Roll. Rep. 81. 11 Rep. 34.

But further, with reference to the offence now under consideration, it has been holden that the word *avoid* is to be taken in a large sense, and includes rasing, clipping, or any other kind of avoiding: and that not only any alteration of a record whereby the judgment is *reversed*, (by which is to be understood *annulled*) but also whereby it is so made void as to be *reversible*, is within the statute 8 H. 6.; and that whether made before or after judgment, or whether or not afterwards amended by the Court. So if A. B. be outlawed by the name of A. C., and afterwards the record be altered from A. C. to A. B., this is within the statute, because the record as it stood against A. C. is thereby annulled, and the judgment prevented which might have been given on a writ of error for this defect: and the statute was made in advancement of justice and to remedy the mischief.

In no instance can the counterfeiting or alteration of any judicial process or matter be less than a very high misdemeanor, as tending to stop or impede the course of justice, or to incroach upon the judicial power.

2. Public Funds, and Stocks of public Companies.

§ 9. *b*

Public funds and stocks of public companies. 8 Geo. 1. c. 22. 31 Geo. 2. c. 22. s. 77. 4 Geo. 3. c. 25. *Vide* 9 Geo. 1. c. 12.

2. The stats. 8 Geo. 1. c. 22. s. 1. and 31 Geo. 2. c. 22. s. 77. protect from forgery all the public funds then or since established by the authority of parliament. The stats. 31 Geo. 2. c. 22. s. 77. and 4 Geo. 3. c. 25. s. 15. extend the same protection to the parliamentary funds or stocks of public companies, and the 8 Geo. 1. c. 22. especially includes the South-Sea Company, as the stat. 9 Geo. 1. c. 12. and other acts especially include particular orders and public annuities.

8 Geo. 1. c. 22. *Forging handwriting of proprietors of shares in the funds of public companies, established by parliament, or the* DIVIDENDS *thereof, or the hand-writing of persons entitled to* ANNUITIES *in the public funds, or* DIVIDENDS *thereof, to convey*

The stat. 8 Geo. 1. c. 22. s. 1. reciting that divers frauds and abuses had been committed "by forging and counterfeiting the hands of some of the proprietors of the shares of and in the capital stock and funds of such body or bodies politic or coporate as are established by act or acts of parliament in that behalf, or some of them, or by forging or counterfeiting the hands of persons entitled to the dividends attending the said shares, or some of them, or the hands of persons entitled to annuities in respect whereof the proprietors have transferable shares in a capital stock

"or

By statute, of public stocks.

" or stocks established by act or acts of parliament in pro-
" portion to their respective annuities; and divers frauds
" and abuses have been or may be committed by persons
" falsely and deceitfully personating the true and real pro-
" prietors of the said shares in stock annuities and dividends,
" or some of them," &c. for better prevention enacts " that
" if any person or persons whatsoever from and after the
" 1st of March 1721 shall forge or counterfeit, or pro-
" cure to be forged or counterfeited, or knowingly and
" wilfully act or assist in the forging or counterfeiting any
" letter of attorney, or other authority or instrument to
" transfer, assign, sell, or convey, any such share or shares
" or any part of such share or shares of and in such capital
" stock or stocks as aforesaid, or any of them; or to receive
" any such annuity or annuities, dividend or dividends as afore-
" said, or any of them, or any part thereof; or shall forge or
" counterfeit or procure to be forged, &c. or knowingly and
" wilfully act or assist in the forging or counterfeiting any
" the name or names of any the proprietors of any such share
" or shares in stock, or of any the persons entitled to any such
" annuity or annuities, dividend or dividends as aforesaid,
" in or to any such pretended letter of attorney, instrument,
" or authority; or shall knowingly and (*a*) fraudulently de-
" mand or endeavour to have any such share or shares in
" stock, or any part thereof, transferred, assigned, sold, or
" conveyed, or such annuity or annuities, dividend or divi-
" dends, or any part thereof to be received by virtue of any
" such counterfeit or forged letter of attorney, authority or
" instrument; or shall falsely and deceitfully personate any
" true and real proprietors of the said shares in stock annui-
" ties and dividends, or any of them, or any part thereof,
" and thereby transferring or endeavouring to transfer the
" stock, or receiving or endeavouring to receive the money
" of such true and lawful proprietor, as if such offender
" were the true and lawful owner thereof; in all or any
" such case all and every such person and persons (being
" thereof lawfully convicted) shall be adjudged guilty of fe-
" lony without benefit of clergy."

the same; or PERSONATING *the proprietors, and thereby* TRANSFERRING *or* ENDEAVOURING *to transfer such shares, annuities, or dividends; felony without clergy.*

(*a*) The stat. 31 Geo. 2. c. 22. s. 77. has the word *or* here instead of *and*.

The stat. 31 Geo. 2. c. 22. s. 77. reciting doubts whether the abovementioned act extended to the like forgery and offences in relation to such capital stocks and funds as had been

31 Geo. 2. c. 22. s. 77. *Extending provisions of former acts more largely*

Ch. XIX. § 9. *By statute, of public stocks.*

been established by authority of Parliament since the passing of that act, or that might be thereafter established, re-enacts and extends in terms all the provisions of the former act to

to stock, then or thereafter to be created by act of parliament.

" the capital stock or funds of any body or bodies politic or " corporate established, *or which shall be established*, by any " act or acts of Parliament," &c.

4 Geo. 3. c. 25. *Extending to future corporations.*

The stat. 4 Geo. 3. c. 25. s. 15. which continued the corporation of the Bank, extends the same provisions to any " capital stock or stocks *of any body or bodies politic or corpo-* " *rate* which *now are* or *hereafter shall be* established by any " act or acts of Parliament," &c.

33 Geo. 3. c. 30. *Reciting certain mischiefs.*

By stat. 33 Geo. 3. c. 30. reciting that " the laws then " in being had been found insufficient to prevent forgeries " and frauds in the transferring stocks, annuities, and other " public funds, transferable at the Bank of England; and " that for the better preventing such forgeries and frauds in " future, it was necessary that further provision should be " made, as well to prevent frauds practised by persons taking " upon themselves to make transfers in the books of the go- " vernor and company of the Bank of England, of stock or " annuities, or other funds, transferable as aforesaid, whereof " such persons were not the true owners and proprietors, " as to prevent forgeries of such transfers in the names " of the true owners or proprietors. And that it was also " necessary, the better to prevent such forgeries and frauds, " that the public accounts between the governor and com- " pany of the Bank of England and the several owners and " proprietors of stock, annuities, and other funds, transfer- " able at the Bank of England, should be secured from fal- " sification by means of false entries therein, or of the " alteration of any of the words or figures thereof, or by any

Persons making, or assisting in making, transfers of stock in any other names than the owners, guilty of felony.

" other ways or means whatsoever:" enacts, " That from " and after the 10th of May 1793, if any person or persons " shall wilfully make, or assist in making, any transfer of " any interest, part, or share of or in any stock or stocks, " annuity or annuities or other funds, transferable at the " Bank of England, in any of the books of the said gover- " nor, &c. in which transfers of stock, annuities, or other " funds, as aforesaid, are made, in the name or names of " any person or persons, not being the owner or owners, or " proprietor or proprietors of such stock, annuities, or other " funds,

By statute, of public stocks.

" funds, transferable as aforesaid; with intent to defraud " the said governor, &c. or any other body politic or cor- " porate, or any person or persons whatsoever, such person " or persons so making, or assisting in making, such transfer " as aforesaid, shall be deemed guilty of felony, without " benefit of clergy."

Also persons forging, or assisting in forging transfers, &c.

By s. 2. " If any person or persons whatsoever shall from " and after the 10th of May 1793, falsely make, forge, or " counterfeit, or cause or procure to be falsely made, forged, " or counterfeited, or shall willingly act or assist in the " falsely making, forging, or counterfeiting of any transfer " of any interest, part, or share of or in any stock or stocks, " annuity or annuities, or other funds, transferable, or " which by any act or acts of parliament shall hereafter be " made transferable, at the Bank of England, or of or in " the capital stock belonging, or which hereafter shall or " may belong to the said governor, &c. called bank stock; " or shall utter or publish as true any such false, forged, or " counterfeited transfer as aforesaid, knowing the same to " be false, forged, or counterfeited; with intent to defraud " the said governor, &c. or any other body politic or corpo- " rate, or any person or persons whatsoever; all and every " person or persons whatsoever so offending shall be deemed " guilty of felony without benefit of clergy."

And also persons making, or assisting in making, false entries in the books of the Bank, &c.

By s. 3. " If any person or persons from and after the " said 10th of May 1793, shall wilfully make, or assist in " making, any false entry, or shall wilfully alter, or assist in " altering, any word or figure in any entry in the books of " account kept by the said governor, &c. wherein the seve- " ral accounts of the owners or proprietors of stock, annui- " ties, or other funds, transferable at the Bank of England, " are entered and kept; or shall in any manner wilfully " falsify the accounts of such owners and proprietors in the " books of the said governor and company, wherein such " accounts are entered and kept, with intent to defraud the " said governor, &c. or any other body politic or corporate, " or any person or persons whatsoever; every such person " or persons so offending shall be deemed guilty of felony " without benefit of clergy."

Sect. 4. reciting that " whereas in order to cover and " conceal forgeries and frauds in transfers, dividend war- " rants

Ch. XIX. § 9. *By statute, of public stocks.*

Persons making out, &c. false dividend warrants, to be transported for seven years.

" rants have been sometimes made out for different sums " than the sums really due:" enacts, " that if any clerk, " officer, or servant of, or other person or persons employed " or intrusted by the said governor and company shall, from " and after the said 10th of May 1793, knowingly or wil- " lingly make out or deliver, or cause or procure to be made " out or delivered, or willingly act or assist in the making " out or delivering, of any dividend warrant for a greater or " less amount than the person or persons on whose behalf, " or pretended behalf, such dividend warrants shall be made " out, is or are entitled to; with intent to defraud the said " governor, &c. or any other body politic or corporate, or " any person or persons whatsoever; all and every such " person or persons so offending, and being convicted of such " offence or offences as aforesaid shall be transported for " seven years."

37 Geo. 3. c. 122. *Reciting the mode of transferring stock.*

The stat. 37 Geo. 3. c. 122. reciting that " Whereas by " the several statutes creating and authorizing the transfer of " the public stocks, &c. transferable at the Bank of England, " it is provided, that all assignments, or transfers thereof, " shall be entered and registered in books to be kept by the " accountant-general of the Bank, which entries shall be sign- " ed by the parties making such assignments or transfers, or " if such parties be absent, by their respective attorney or at- " tornies thereunto lawfully authorized in writing under their " hands and seals, *to be attested by two or more credible wit- " nesses;* and the same regulation is prescribed and observed " with respect to the attestation of letters of attorney for the " transfer of any part of bank stock:" and further reciting that by the stat. 9. Ann. (c. 21.) and other acts, and by the charter of the (South-Sea) company the like regulations prevail in transfers of South-Sea stock; and also of East-India stock by the regulations of that company; " and that it is " expedient that provision should be made for the prevention " of all frauds and impositions upon the said respective " governors and companies and the said united company, " respecting the transfer of, or the receipt of dividends " upon, any of the public funds or annuities, transferable " at the Bank of England, or of bank stock, or of the capital " stock of the said South-Sea company, or of the said united " company, or any other stocks or funds arising thereout, or " transfer-

Ch. XIX. § 9.

By statute, of public stocks.

" transferable, or which shall hereafter be made transferable, at the South-Sea house or East-India house respectively:" enacts, " That if any person or persons whatever shall from and after the 1st of August 1797, falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly act or assist in the falsely making, forging, or counterfeiting the name or names, hand-writing or hands-writing of any person or persons as, or purporting to be, the witness or witnesses attesting the execution of any letter of attorney, or other authority or instrument, to transfer, assign, sell, or convey any interest, part, or share, of or in any stock or stocks, annuity or annuities, or other funds, or the dividends thereof, transferable, or which, by any act or acts of parliament, shall hereafter be made transferable at the Bank of England, or of or in the capital stock belonging, or which hereafter shall or may belong, to the governor, &c. of the Bank of England, called bank stock, or to the governor, &c. (of the South-Sea company), or under their care or management, or of or in the capital stock belonging, or which hereafter shall or may belong, to the said united company, &c. trading to the East-Indies, commonly called East-India stock, or of any letter of attorney, or other authority or instrument, to receive any dividend or dividends on any of the said stocks, annuities, or other funds; or shall utter or publish, as true, any such letter of attorney, or other authority or instrument, containing such false, forged, or counterfeited name or names, hand-writing or hands-writing, of such attesting witness or witnesses as aforesaid, knowing such name or names, hand-writing or hands-writing, to be false, forged, or counterfeited; all and every person or persons whatever so offending, and being convicted of any such offence or offences as aforesaid, shall be adjudged guilty of felony, and shall be transported for seven years; or shall be adjudged to suffer such lesser punishment as the Court, before whom such offender or offenders shall be tried, shall think fit to award." This is made a public act.

Persons forging the names of witnesses to instruments for the transfer, or receipt of dividends, of stocks at the Bank, or of the South Sea or East India Company's stocks, to be guilty of felony, and be transported for 7 years, or suffer such lesser punishment as the Court shall award.

The stats. 35 Geo. 3. c. 66. and 37 Geo. 3. c. 46. for making certain annuities created by the parliament of Ireland transferable, and the dividends thereon payable at the Bank of

Ch. XIX. § 9. *By statute, of public stocks.*

of England, &c. enact, (s. 2.) "That it shall and may be "lawful for the governor, &c. of the Bank of England to "authorize and direct their accountant-general for the time "being to keep books wherein all assignments or transfers "of the said (i. e. therein before mentioned) annuities and "principal sums or stock shall be entered and registered in "such manner as the said governor, &c. shall direct; which "entry shall be signed by the parties making such assign-"ments or transfers, or if such parties be absent, by their "respective attorney or attornies thereunto lawfully autho-"rized in writing under his her or their hand and seal, or "hands and seals, to be attested by two or more credible "witnesses; and that the several persons to whom such "transfers shall be made shall respectively underwrite their "acceptance thereof by themselves or by their respective "attorney or attornies thereunto lawfully authorized in "manner aforesaid; and that no other method of assigning "or transferring the said annuities and principal sum or "stock, or any part thereof, or any interest therein, shall be "good or available in law. Provided that no stamp duties "whatsoever shall be charged on any of the said transfers, "nor on any receipt for any payment in respect of the said "annuities, or the said principal sums, or stock, or the in-"terest thereof," &c.

35 Geo. 3. c. 66. and 37 Geo. 3. c. 46. *Regulations for transferring the payment of certain annuities and dividends from Ireland to the Bank of England.*

Forging receipts for subscriptions to loans or debentures under the respective acts, either with or without names of subscribers; or altering such, death.

By s. 3. reciting that "whereas for the prevention of "forgeries and frauds in respect of the receipts, payments, "and transfers made or given in pursuance of this act, it is "necessary that the like provisions should be enacted as by "the laws now in being are already in force respecting "stocks, annuities, and other public funds transferable at "the Bank of England, be it enacted that from and after "the passing of this act, if any person or persons shall forge "or counterfeit, or cause or procure to be forged or coun-"terfeited, or (*a*) wilfully act or assist in the forging or "counterfeiting any receipt or receipts for the whole or any "part or parts of the said subscriptions, or contributing to-"wards the said (loans or principal sums respectively,) or "any debenture or debentures purporting to entitle any "person or persons or body politic or corporate whatsoever "to any principal sum or the interest thereon, or any an-"nuity or part of any principal sum, interest, or annuity "payable

((*a*) The stat. 8 Geo. 1. c. 22. has the words *knowingly and wilfully.*)

" payable under the said (respective acts of parliament of Ireland) either with or without the name or names of any person or persons, or body politic or corporate being inserted therein as the subscriber or subscribers, or contributor or contributors, or payer or payers, towards the said (loans or principal sums respectively) or any part or parts thereof; or shall alter any number, figure, or word therein; or utter or publish as true any such false, forged, counterfeited, or altered receipt or receipts, debenture or debentures, with intention to defraud the governor and company of the Bank of England, or any body politic or corporate, or any person or persons whatsoever; every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or wilfully acting or assisting in the forging or counterfeiting, or altering uttering or publishing as aforesaid, shall be deemed guilty of felony without benefit of clergy (*a*)." Ch. XIX. § 9. *By statute, of public stocks.*

Sect. 4. contains the same provision as the stat. 8 Geo. 1. c. 22. s. 1. before mentioned, adding the word *interest* to " annuities or dividends" there mentioned; and s. 7, 8, 9, & 10. re-enact the provisions of the stat. 33 Geo. 3. c. 30. before stated. Ante, 866. Ante, 868.

By s. 5. " If any person or persons shall forge, counterfeit, or alter any dividend warrant, or warrant for payment of any annuity, interest or money payable in pursuance of this act (respectively) at the Bank of England, or any indorsement thereon; or shall offer or dispose of or put away any such forged counterfeited or altered dividend warrant, or warrant for payment of any annuity, interest, or mo- *Forging or uttering forged dividend warrants.*

(*a*) This is a common clause, the substance of which is to be found in other acts for raising new loans. *Vide* 41 Geo. 3. (U. K.) c. 3. s. 24. The last of these acts in print is the 42 Geo. 3. c. 8. s. 26. whereby " if any " person or persons shall forge or counterfeit, or cause or procure to be " forged, &c. or shall willingly act or assist in the forging, &c. any certificate or certificates, receipt or receipts, directed to be made out by " this act, or any assignment thereof or indorsement thereon, or shall " alter any number, figure, or word, in any such certificate or receipt, or " in any assignment thereof, or indorsement thereon; or utter or publish " as true any such false, forged, counterfeited, or altered certificate or " certificates, receipt or receipts, or assignment or assignments thereof, " or indorsement or indorsements thereon; with intent to defraud his " Majesty, or the governor and company of the Bank of England, or any " body politic or corporate, or any person or persons whatsoever;" every such offender shall on conviction be adjudged guilty of felony without clergy.

Ch. XIX. § 9. *By statute, of public stocks.*

" ney, payable as aforesaid, or the indorsement thereon; or " demand the money therein contained or pretended to be " due thereon, or any part thereof, of the said governor and " company of the Bank of England, or any their officers or " servants; knowing such dividend warrant, &c. to be " forged, counterfeited, or altered; with intent to defraud " the said governor, &c. or their successors, or any other " body politic or corporate, or any person or persons whatso- " ever; every person or persons so offending shall be deemed " guilty of felony without benefit of clergy."

The substance of this clause as a general provision is to be found in the stat. 15 Geo. 2. c. 13. s. 11. after mentioned.

Post. s. 10.

Gade's case, O. B. Feb. 1796, MS. Jud.

An indictment for forging a transfer of a share in the 3 per cents. charged that W. H. was possessed of and entitled to such share; and the evidence was that the former owner had transferred the same into the name of the said W. H. who was entitled to it by virtue of a bequest, but that W. H. had not accepted such transfer as required by stat. 33 Geo. 3. c. 28.: *yet held well upon the* st. 33 G. 3. c. 30.; *nor is it any objection that such transfer was not witnessed as required by the regulations at the Bank in the printed form, in which transfers are there made.* (2 Leach, 847. S. C.)

John Henry Gade was tried before Lawrence J. at the Old Bailey, February 1796, on an indictment charging that William Harrison *was possessed of and entitled to* 50*l.* interest or share in the consolidated 3 per cent. annuities; and that the prisoner whilst W. H. was so possessed of and entitled to the said 50*l.* &c. did falsely make forge and counterfeit a *transfer* of the said 50*l.* interest or share, with the name of the said W. H. thereto subscribed, purporting to have been signed by the said W. H., and to be a transfer of the said 50*l.* &c. from the said W. H. unto one W. W., the tenor of which is as follows; (setting it out); with intent to defraud the governor and company of the Bank of England, contrary to the form of the statute, &c. Other counts charged the intent to be to defraud W. H. and W. W. Others charged the prisoner with publishing the transfer, knowing it to be forged, with the same intent. And others again charged the prisoner generally with forging a certain transfer, to wit, a transfer of an interest and share, viz. 50*l.* interest and share of and in certain annuities transferable at the Bank of England, commonly called " consolidated " 3 per cent. annuities," without stating to whom the stock belonged, or reciting the statutes relating thereto, in fraud of the same several persons.

In support of the charge it was proved that the prisoner and Henry Harland being executors of John Howard who had by his will given 50*l.* in the 3 per cent. consols to his grandson William Harrison, on the 11th January 1796 transfer-

By statute, of public stocks.

transferred the same into the name of William Harrison; *but the transfer never was accepted by William Harrison.* That afterwards, on the 14th of January, the prisoner brought his own son with him to the Bank, whom he represented to be William Harrison; and by the intervention of a broker the stock was agreed to be sold to William West; and the prisoner's son in his presence signed the transfer, which was properly filled up: but as he wrote the name "Harrisson" with a double (ss) it was required of him to bring an affidavit that he was the person described in the books of the Bank by the name of Harrison with a single (s); in consequence of which the broker did not pay over the money he had received from West for the stock, and the transfer was not witnessed; which according to the printed form of transfers used at the Bank should be done. It appeared also on the examination of clerks of the Bank that dividends may be received on stock before it is accepted; but that there are positive orders not to transfer any stock till it has been accepted; which the clerks should see done: but that with the stock-jobbers transfers are too often made without the stock being first accepted.

A clause of the same sort as that before set out in the 35 Geo. 3. c. 66. *which is also to be found in other statutes. Vide* 2 Leach, 855.

It was objected for the prisoner that as the stat. 33 Geo. 3. c. 28. requires "that the books shall be kept at the Bank "for the entering of all transfers, which shall be conceived "in proper words for that purpose, and signed by the parties "making such transfers, and that the several persons to "whom such transfers shall be made shall underwrite their "acceptance thereof, and no other method of transferring "or assigning the said annuities shall be good or available "in law;" that the evidence did not support the indictment: first, For want of the acceptance of Harrison of the transfer made to him by the executors of Howard; till which time it was contended that the transfer was incomplete, and Harrison was not possessed of the 50*l.* stock. Secondly, Because that till the stock was accepted no transfer at all could be made. 3dly, Because the instrument given in evidence as a transfer in the name of William Harrison was not witnessed; which being, as was contended, a part of the words in which transfers were conceived, the instrument was not available in law, and therefore no transfer. And the want of witnessing was compared to the omissions in the bill of

Ch. XIX. § 9. *By statute, of public stocks.*

of exchange in Moffat's case, Leach, 337. (*a*). The jury found the prisoner guilty, but sentence was respited till the Judges could be consulted on these objections: and in Easter term 1796 they were all over-ruled, and the offence was holden to be complete.

The indictment in the above case was supported in argument by the counsel for the prosecution on the 2d sect. of the stat. 33 Geo. 3. c. 30. And in the June sessions following Mr. Justice Buller is stated to have delivered the opinion of the Judges to this effect. After stating the objections, which had been urged in the Exchequer-chamber, he observed as to the two first that two answers had been given, 1. That the stock vested in W. H. by the mere act of transferring it into his name; and that if he had died before he had accepted it, yet it would have gone to his executors as part of his personal estate. 2. That the nature of the offence would not have been altered if W. H. had not had any stock standing in his name: for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred. Neither the forgery nor the fraud would have been less complete if Harrison had really had no stock. As to the 3d objection, that the Judges all thought that the entry and signatures as stated in the indictment were a complete transfer without the attestation of witnesses, which was no part of the instrument, but only required by the Bank for their own protection ex abundanti cautelâ.

2 Leach, 866.

3. *Notes and other Securities of the Bank of England and other public Companies.*

§ 10. *Notes, &c. of the Bank of England.* 15 Geo. 2. c. 13 s. 11. *Forging Bank notes, bills, dividend warrants, bonds, or indorsements; or offering, &c. the same, or demanding mone thereon, &c. capital felonies.*

1. *Of the Bank of England.* The st. 15 Geo. 2. c. 13. s. 11. enacts, "That if any person or persons shall forge counterfeit or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation under the common seal of the said company, (i. e. Bank of England) or any indorsement thereon, or shall offer, or dispose of, or put away any such forged counterfeit or altered note, &c. or the indorsement thereon, or demand the money therein contained or pretended to be due thereon, or any part thereof of the said company or any their officers or

(*a*) Last edit. 2 vol. 483.

"servants,

" servants, knowing such note, &c. to be forged counter- " feited or altered, with intent to defraud the said company, " or their successors, or any other person or persons what- " soever; every person or persons so offending, and being " thereof convicted in due form of law, shall be deemed " guilty of felony without benefit of clergy."

By statute, of public securities of the Bank, &c. 13 *Geo.* 3. c. 79.

Vide Biggs's case, and Jones's case, post. s. 11.

By several statutes passed in the reign of King William 3. " the forging or counterfeiting the common seal of the cor- " poration of the governor and company of the Bank of " England," is made felony without benefit of clergy; which provision still remains; for the stat. 11 Geo. 1. c. 9., which left several of the offences contained in those acts simple felonies, makes no mention of the common seal, and reserves all the pains and penalties, &c. of former acts not thereby altered.

7 & 8 W. 3. c. 31. s. 36. 8 & 9 W. 3. c. 20. s. 36. 11 Geo. 1. c. 9. *Seal of the Bank.*

By 13 Geo. 3. c. 79. s. 1. " If any person or persons " (other than the officers, servants, workmen, or agents for " the time being of the governor and company of the Bank, " to be authorized and appointed by them for that purpose, " and for the use of the said governor and company only), shall " make or use, or cause or procure to be made or used, or " knowingly aid or assist in making or using, or [without be- " ing authorized as aforesaid] shall knowingly have in his her " or their custody or possession, without lawful excuse, [the " proof whereof shall lie on the person accused] any frame, " mould, or instrument, for the making of paper, with the " words *Bank of England* visible in the substance of such pa- " per; or shall make, or cause or procure to be made, or know- " ingly aid or assist in the making any paper, in the substance " of which the said words *Bank of England* shall be visible; or " if any person (except as before excepted) shall by any art or " mystery or contrivance cause or procure the said words " *Bank of England* to appear visible in the substance of any " paper whatsoever; or knowingly aid or assist in causing " the said words *Bank of England* to appear in the substance " of any paper whatsoever, every such offender shall, being " thereof lawfully convicted, be adjudged a felon without " benefit of clergy."

13 Geo. 3. c. 79. *making or knowingly having in possession instruments for making paper with the words* BANK OF ENGLAND *visible in the substance of it, a capital felony.*

And after reciting (s. 2.) " that persons have taken in " payment and otherwise received notes, inland bills, and " bills

Engraving notes, &c. with like words or with

Ch. XIX. § 10. " bills of exchange, with certain words and characters so " nearly resembling the notes and bills of the said governor " and company as to appear to such persons to be the notes " or bills of the Bank of England; to the great prejudice of " public credit," it is enacted, " that if any person or per- " sons, without being authorized and appointed as aforesaid, " shall engrave, cut, etch or scrape in mezzotinto, or cause " or procure to be engraved, &c.; or shall knowingly aid or " assist in the engraving, &c. in or upon any plate of cop- " per, brass, steel, pewter, or of any other metal or mixture " of metals, or upon wood, or any other material or any " plate whatsoever, any promissory note, inland bill, or bill " of exchange, or blank promissory note, inland bill, or bill " of exchange, or part of a promissory note, inland bill, or " bill of exchange, containing the words *Bank of England*, " or *Bank post bill*, or any word or words expressing the sum " or amount, or any part of the sum or amount of such " promissory note, inland bill, or bill of exchange, *in white* " *letters or figures on a black ground;* or shall use any such " plate so engraved, &c. or shall use any other instrument " for the making or printing any such promissory note, in- " land bill, or bill of exchange, or blank promissory note, " inland bill, or bill of exchange, or part of a promissory " note, inland bill, or bill of exchange; (or (*a*)) if any per- " son or persons (without being authorized and appointed as " aforesaid) shall knowingly have in his her or their custody " any such plate or instrument, or shall knowingly and wil- " fully utter or publish any such promissory note, inland " bill, or bill of exchange, blank promissory note, inland " bill, or bill of exchange; every such offender shall, being " convicted thereof, be committed to the common gaol of " the county or place where the offence shall be committed " for any space not exceeding six months." With a proviso (s. 3.) not " to extend to such person, who being possessed " of any such note or bill, shall only utter the same by car- " rying the same for payment to the issuers, drawers, ac- " ceptors, or indorsers thereof respectively, or using proper " means to compel the payment of any such note or bill."

By statute, of public securities of the Bank, &c.

the SUMS IN WHITE LETTERS ON BLACK GROUND, *or knowingly having such in possession, or uttering, &c. subject to imprisonment.*

(*a*) The word *or* is here omitted in Runnington's edition of the Statutes, probably by a mistake of the press.

The

Ch. XIX. § 10.

By statute, of public securities of the Bank, &c.

41 Geo. 3. (U. K.) c. 39. *Making or having in possession without authority any instrument for making paper of the sort therein described* WITH CURVED BAR LINES, *or the* SUMS APPEARING IN THE SUBSTANCE OF THE PAPER, *or procuring the numerical sum of any Bank note, &c. to appear visible in the substance of the paper, &c. felony and transportation for* 14 *years.*

The stat. 41 Geo. 3. c. 39. reciting that "whereas the "forgery of bank notes, bank bills of exchange, and bank "post bills had much increased, and that to prevent it, and "also to facilitate the detection of it, the Bank of England "had procured to be made for the future issue of bank "notes, &c. a new paper of a different manufacture from "that formerly used either by the bank or any other; "in which new paper instead of the bar lines being straight "and parallel to each other, as in the paper heretofore used, "the same are curved or waving, and the laying wire lines "are also formed in a waved or curved shape, and the nu- "merical account or sum of each bank note, &c. expressed in "a word or words in Roman letters, is made to appear visible "in the substance of the paper. And whereas it is expe- "dient, for the better prevention of the forgery of bank "notes, &c. that the said governor and company should have "the exclusive privilege of using, in the issue of their notes "and bills, the paper herein before described, it is enacted "that if any person or persons, (other than the officers, "workmen, servants, or agents for the time being, of the "said governor, &c. to be authorized and appointed for that "purpose by the said governor, &c. and for the use of the "said governor, &c. only) shall make or use, or cause or "procure to be made or used, or knowingly aid or assist in "making or using; or (without being authorized or appointed "as aforesaid) shall knowingly have in his, her, or their "custody or possession, (without lawful excuse, the proof "whereof shall lie upon the person accused) any frame, "mould, or instrument, for the making of paper, with "curved or waving bar lines, or with the laying wire lines "thereof in a waving or curved shape, or with any number, "sum or amount, expressed in a word or words, in Roman "letters, visible in the substance of such paper; or shall ma- "nufacture, make, use, vend, expose to sale, publish or dis- "pose of, or cause or procure to be manufactured, &c. or "aid or assist in the manufacturing, &c.; or (without being "authorized or appointed as aforesaid) shall knowingly have "in his, her, or their custody or possession any paper what- "soever, with curved or waving bar lines, &c. (as before;) "or if any person or persons (except as before excepted)

"shall,

Ch. XIX. § 10. *By statute, of public securities of the Bank, &c.* 41 Geo. 3. c. 39.

" shall, by any art, mystery, or contrivance, cause or procure " the numerical sum or amount of any bank note, bank bill " of exchange, or bank post bill, blank bank note, blank " bank bill of exchange, or blank bank post bill, in a word " or words to appear visible in the substance of the paper " whereon the same shall be written or printed; or shall " knowingly aid or assist in causing the numerical sum or " amount of any bank note, &c. in a word or words in Ro- " man letters to appear visible in the substance of the paper " whereon the same shall be written or printed; every per- " son or persons so offending in any of the cases aforesaid, " and being convicted thereof according to law, shall be " adjudged a felon and shall be transported for the term of " 14 years."

Not to restrain the negociation of bills already issued on such paper.

By s. 2. " the act shall not extend to restrain or render " illegal the negociation, circulation, or re-issuing of any bill " or bills of exchange, promissory note, or promissory notes, " which have already lawfully been issued, negociated, or " circulated, or which shall or may be now lawfully re- " issued, negociated, or circulated, before the 1st of No- " vember 1801, notwithstanding the same shall be written " or printed upon paper, which by this act is prohibited from " being manufactured, made, used, vended, exposed to sale, " published or disposed of, except by the governor and com-

Nor the issuing of bills with the amount expressed in guineas, or with figures in pounds, in the paper.

" pany of the Bank of England; nor by (s. 3.) to extend to " restrain any person or persons from issuing or negociating " any bill or bills of exchange, promissory note, or promissory " notes, having the sum or amount thereof expressed in " guineas or in a numerical figure or figures denominating " the sum or amount thereof in pounds sterling, appearing " visible in the substance of the paper upon which the same

Nor the making or using paper with water marks not resembling those of the Bank.

" shall be written or printed. Nor (by s. 4.) to restrain or " prevent any person or persons from making, using, vend- " ing, exposing to sale, publishing, or disposing of any paper " having waving or curved lines, or any other devices in the " nature of water-marks, visible in the substance of the " paper, not being bar lines, or laying wire lines; provided " the same are not contrived in such manner as to form the " ground-work or texture of the paper, or to imitate or re- " semble the waving or curved laying wire lines, or bar

" lines

Ch. XIX. § 10.

B. statute. Of public securities of the Bank.

"lines of the said new paper of the governor and company "of the Bank of England, or to imitate or resemble the "water-marks used by the said governor, &c. in the bank "notes, &c. issued by the said governor, &c."

41 Geo. 3. c. 39.

Knowingly receiving or having in possession forged Bank notes, &c. without lawful excuse, felony and transportation for 14 years.

Sect. 5. enacts, "That if any person or persons shall from "and after the passing of this act purchase or receive from any "other person or persons any forged or counterfeited bank "note, bank bill of exchange, bank post bill, or blank bank "note, blank bank bill of exchange, or blank bank post bill, "knowing the same to be forged or counterfeited; or shall "knowingly or wittingly have in his, her or their possession "or custody, or in his, her or their dwelling-house, out-"house, lodgings, or apartments, any forged or counter-"feited bank note, &c. knowing the same to be forged or "counterfeited, (without lawful excuse, the proof whereof "shall lie upon the person accused) every person or persons "so offending and being thereof convicted according to "law, shall be adjudged a felon and shall be transported for "the term of 14 years."

Engraving, &c. on plate, &c. any Bank note, &c. purporting to be of the Bank of England, or using such plate, &c. or knowingly having such in possession without written authority, or uttering, &c. felony and transportation for seven years.

Sect. 6. reciting "That whereas the laws now in force "do not inflict a sufficient punishment upon offenders con-"cerned in engraving plates and printing blank forms for "bank notes, bank bills of exchange, and bank post bills, "for the purpose of being made use of in perpetrating the "crime of forgery; enacts, that if any person or persons "from and after the passing of this act shall engrave, cut, "etch, scrape, or by any other means or device make, or "shall cause or procure to be engraved, &c., or shall know-"ingly aid or assist in the engraving, &c. in or upon any "plate of copper, brass, steel, pewter, or of any other metal, "or mixture of metals, or upon any wood, or any other "materials, or any plate whatsoever, any bank note, bank "bill of exchange, bank post bill, or blank bank note, blank "bank bill of exchange, or blank bank post bill, or part of a "bank note, bank bill of exchange, or bank post bill, pur-"porting to be the note or bill of exchange, or bank post "bill, or blank bank note, or blank bank bill of exchange, or "blank bank post bill, or part of the note or bill of exchange "or bank post bill of the governor and company of the Bank "of England, without an authority in writing for that pur-

Ch. XIX. § 10. *By statute. Of public securities of the Bank.*

" pose from the governor, &c.; or shall use any such plate so " engraved, cut, etched, scraped, or by any other means or " device make (*a*); or shall use any other instrument or device " for the making or printing of any such bank note, &c. (as " last before named) without such authority in writing as " aforesaid; or if any person or persons shall, after the passing " of this act, without such authority as aforesaid, knowing- " ly have in his, her or their custody any such plate, instru- " ment or device; or shall without such authority as afore- " said knowingly and wilfully utter, publish, dispose of, or " put away, any such bank note, &c. (as last before named); " every person so offending and being thereof convicted " shall be adjudged a felon and transported for seven " years."

(*a*) Q. A misprint for *made*.

Post. The forgery of *private* documents of the bank will be hereafter considered.

§ 11. Rex v. Bigg, 3 P. Wms. 419. *Expunging by a certain liquor a notification of payment of part of the contents of a Bank bill written on the face of it, sustains an indictment for* RASING OUT AN INDORSEMENT *on such bill.*

John Bigg was indicted (*a*) for rasing out an indorsement of 90*l.* made on a bank bill for 100*l.*, which indorsement was made by the agent of the Bank as for so much money before paid thereon to the bearer on behalf of the company; and a special verdict was found, stating that the prisoner did expunge the words and figures following, " 22*d February* 1714 *paid* 90*l.*" written with red ink *upon the face and inside* of the note, with a certain liquor unknown. On the argument of the case before all the Judges at Sergeants' Inn, several objections were taken. 1. That Adams, who the indictment and verdict stated to have been entrusted by the bank to sign notes, &c. for the company, was not properly authorised under the common seal. 2. That the receipt *on the face* of the note could not be called an *indorsement*. 3. That the taking it out by a liquor could not be called *a rasing*. 4. That the verdict ought to have found the rasure to have been for the

(*a*) The indictment was framed on the stat. 8 & 9 W. 3. c. 20. s. 36. which enacts " that the forging or counterfeiting the common seal of the " corporation of the Governor and Company, or of any sealed Bank bill " made or given out in the name of the said Governor, &c. for the payment " of any sum of money or of any Bank note of any sort whatsoever signed " for the said Governor, &c. of the Bank of England, or the altering or " *rasing* any *indorsement* on any Bank bill or note of any sort shall be and " is hereby declared and adjudged to be felony without benefit of clergy."

sake

Ch. XIX. § 11.

By statute. Of public securities of the Bank.

sake of lucre, or to defraud the company, which it did not do. The printed report says, that the Judges differed in opinion, but the majority held it to be felony. But the fact was (as stated in the MS. quoted) that ten Judges agreed that it was felony, one was ill, and the other place was vacant.

Serjt. Forster's MS. who cites Ld. King's MS. 98. Rex v. Jones al. Thorowgood, B. R. M. 30 G. 3. 1779, Serjt. Forster's MS. (Doug. 302. and 1 Leach, 243. S. C.)

An indictment drawn on the stat. 15 Geo. 2. c. 13. s. 11. charged in the 3d count that the prisoner W. Jones having in his custody a certain forged *paper writing purporting to be a bank note* (prout) did dispose of and put away the same as and for a true bank note, with intent to defraud John Rayner. The fourth count only differed from the third in stating it to be *a note* instead of *a paper writing;* and the sixth count charged that the prisoner uttered and published as true a forged paper writing *purporting to be a promissory note for payment of money.* The forged note was set forth as follows.

Upon a charge of forging a paper writing purporting to be a BANK NOTE, *the resemblance must appear on the face of the instrument, and cannot be supplied by what the prisoner said that it was: and held that the signature being* "FOR SELF "AND CO. OF "MY BANK IN "ENGLAND," *had no such purport.*

"No. F. 946."

"I promise to pay John Wilson Esq. or bearer Ten "Pounds."

"London March 4th 1776."

"£. Ten." "For self and Company"

"Entd. John Jones." "of my Bank in England."

There were a set of counts charging the forgery to be with intent to defraud the bank: but the jury acquitted the prisoner on those; and found specially on the third count, that the paper writing therein set forth was not a note filled up by any of the officers of the Bank of England, nor entered in their books, but was forged. That the prisoner knowing the same averred it to be a good *bank note*, and put it away as such to Rayner with intent to defraud him; and that Rayner believing it to be a good bank note gave the full value of it, and further that the Bank frequently pay bank notes which are filled up by their officers and entered in their books, though they happen not to be signed. The finding on the fourth count was the same, only calling it as in that count *a note* instead of a paper writing. On the sixth they found that the said paper writing, purporting to be a promissory note as in that count set forth, was not filled up, &c. and that the prisoner knowing, &c. uttered it as such (as on the

Ch. XIX. § 11. *By statute. Of public securities of the Bank.*

the third count). The question made on the argument was, whether this paper writing *purported* to be a *bank note?* And the Court, without hearing counsel for the prisoner were of opinion that it did not. *Lord Mansfield* said, that the representation of the prisoner afterwards could not vary the purport of the instrument: on the face of it, it did not purport to be a bank note. It was admitted by the counsel for the prosecution that the finding did not support the sixth count. The prisoner was discharged.

This case does not appear to have turned altogether upon the manner of laying the offence in the indictment: for the same objection did not apply to the 6th count which was framed upon the stats. 2 and 31 Geo. 2. An objection arose out of the very nature of the thing itself forged; namely, that it was no promissory or other note at all of the Bank or otherwise. In order to constitute forgery there must be some resemblance to the thing supposed to be forged, though it need not be an exact one. The forged instrument must at least have the principal constituent parts of that which it is intended to represent, which was wanting in the present case; and therefore the thing itself was no resemblance of that which it was charged to be. Wherefore in cases where any difficulty occurs in drawing the indictment upon the stat. 15 Geo. 2. for defect of similitude between the forgery and the common form of bank notes, it seems best to frame the charge upon the other more general statute of the 2 Geo. 2. c. 25. and its auxiliary statutes, as was done in Elliott's case, and also in the sixth count of Jones's case above referred to. It is however essential to the charge of forgery in every such case that the note should at least purport to be drawn in some other name than that of the party himself charged with the crime, which did not so appear in this instance.

Ante, s. 6.

Post. s. 44.

§ 12. *South-Sea Company.* 9 Ann. c. 21. 6 G. 1. c. 4. s. 56. 12 G. 1. c. 32. s. 9.

In regard to the securities of other public companies; By stats. 9 Ann. c. 21. s. 57. and 6 Geo. 1. c. 4. s. 56. "If any person shall forge or counterfeit the *common seal* of "the South-Sea company; or shall forge, counterfeit or "alter any *bond* or *obligation* under their common seal, or "shall offer to *dispose* of or *pay away* any such forged, coun-

"terfeited

" terfeited or altered bond, knowing the same to be such; Ch. XIX. § 12.
" or shall *demand the money* therein contained or pretended *By statute.*
" to be due thereon, or any part thereof, of the said company *Of public securities of the Bank.*
" or any of their officers, knowing such bond or obligation to
" be forged, counterfeited or altered; with intent to defraud
" the said company or their successors, or any other person or
" persons whatsoever; every such person and persons so of-
" fending shall be guilty of felony without benefit of clergy."

The stat. 12 Geo. 1. c. 32. s. 9. inflicts the same punish- 12 Geo. 1. c. 32.
ment on the " forging, or counterfeiting, or procuring to
" be forged, &c. or willingly acting or assisting in the forg-
" ing any *indorsement or assignment* on any bond or obligation
" under the common seal of the governor and company of
" merchants, &c. trading to the South-Seas, &c."

Also, besides the general provision before stated to Ante, s. 9.
protect the stocks of public companies, the stat. 6 Geo. 1. 8 Geo. 1. c. 22. &c.
c. 11. s. 50. reciting that the corporation, &c. trading 6 Geo. 1. c. 11.
to the S. S. &c. " may issue out *receipts* under the hand *Forging, &c. South-Sea receipts or dividend warrants.*
" or hands of one or more of their officers from time
" to time upon or for subscriptions to be by the said com-
" pany taken for increasing their capital stock pursuant
" to an act of the same session, and may also issue out *war-*
" *rants* under the hand or hands of one or more of their
" officers for the dividend from time to time to be made to
" the proprietors of the stock in the said company; enacts,
" that if any person or persons shall forge, counterfeit or
" alter any such receipt or receipts, warrant or warrants, or
" any indorsement or writing, indorsements or writings
" thereupon or therein, or shall tender any such forged, coun-
" terfeited or altered receipt or receipts, or warrant or war-
" rants, or any such receipt or warrant, &c. with such coun-
" terfeit indorsement or writing thereon or therein, knowing
" the same to be so forged, counterfeited, or altered, to the
" said company or any of their officers; or shall offer to alie-
" nate or dispose of the same, knowing the same to be forged,
" counterfeited or altered; and with intent to defraud the
" said company or any other person or persons, bodies poli-
" tic or corporate; every such person or persons so offend-
" ing (being thereof lawfully convicted) shall be adjudged a
" felon, without benefit of clergy."

Provisions

Ch. XIX. § 13. *By statute.*

Provisions similar to those in the stats. 9 Ann. c. 21. and 6 Geo. 1. c. 4. above mentioned, are made in respect to the London and Royal Exchange Assurance Companies, mutatis mutandis, only including further "any *policy* or *bill*," as well as bond or obligation *under the common seal* of either.

§ 13. *London and Royal Exchange Assurance Companies, &c.* 6 Geo. 1. c. 18. s. 13. *Vide* also 39 G. 3. (c. 83.) s. 22.

In like manner the Globe Insurance Company is protected from forgery.

§ 14. *East India Company.* 12 Geo. 1. c. 32. s. 9.

It is also made felony without benefit of clergy if any person shall "forge or counterfeit, or procure to be forged, "&c. or willingly act or assist in the forging, &c. any *bond* "or *obligation* under the common seal of (the East-India "Company), or any *indorsement* or *assignment* thereon; or "shall *utter* or *publish* any such, *knowing* the same to be "forged or counterfeited, with intent to defraud any person "(*a*) whatsoever, being thereof lawfully convicted."

§ 15. *Plate glass manufactory.* 13 Geo. 3. c. 38. s. 28. and 38 Geo. 3. c. 17. s. 23.

By stat. 13 Geo. 3. c. 38. s. 28. revived by stat. 33 Geo. 3. (c. 17.) s. 23. "If any person or persons shall forge or "counterfeit the *seal* of the governor and company of the "British Cast Plate Glass Manufactory, or any *deed* or "*writing* under their common seal; or shall *demand any* "*money* in pursuance of any such forged or counterfeited "deed or writing, either from the said corporation or any "members or servants thereof, knowing such writing to be "forged, with intent to defraud the same corporation or "any other person or persons whomsoever; every person so "offending, and being duly convicted, shall be guilty of "felony and suffer as a felon (*b*)."

4. *To Stamps.*

§ 16. *Vide* 3 Bac. Abr. 285. 1 Hawk. ch. 58. s. 9. in margin, and 12 Geo. 3. c. 48. as a general one.

Stamps denoting the payment of certain duties are required by various acts of parliament to be affixed on a multiplicity of written or printed documents. And for the purpose of protecting the revenue from fraud in counterfeit-

(*a*) The word *person* does not seem an appropriate term as applied to the subject matter, namely, a corporation. However, this seems included in the general acts of the 2 Geo. 2. c. 25. and 31 Geo. 2. c. 22. s. 78.

(*b*) The first mentioned act, which had expired, directed the felon to be transported to America for a term not exceeding seven years; but that is omitted in the reviving act.

ing,

ing, uttering, or vending the same knowingly, the respective acts (*a*) always contain a clause for the most part in the precise words following; though sometimes with some verbal differences, which as far as have met my notice are marked below. I select as the one most generally adopted in modern times the 5th clause of the stat. 37 Geo. 3. c. 90. which imposes additional duties on a great variety of instruments therein mentioned; and also because the same form is used (with the additional words, *mark* or *seal* as well as *stamp*) in the general consolidating act of the 27 Geo. 3. c. 13. s. 46. which includes stamps imposed by that and all former acts.

" If any person shall counterfeit or forge, or cause or 37 Geo. 3. c. 90.
" procure to be counterfeited or forged any stamp (*b*) di- s. 5.
" rected or allowed to be used by this act, or provided
" made or used for the purpose of denoting the duties by
" this act granted as aforesaid, or any of them, or shall
" counterfeit or resemble the impression of the same (*c*),
" with an intent to defraud his Majesty his heirs, &c. of
" any of the said duties; or shall utter, vend or sell (*d*)
" any vellum, parchment, or paper, liable to any stamp
" duty by this act imposed, with such counterfeit stamp or
" mark thereupon, knowing the same to be counterfeit; or
" shall privately or fraudulently (*e*) use any stamp directed

(*a*) See the Index to Runnington's edition of the Statutes at large, title *Stamps.*

(*b*) The statutes 31 Geo. 3. c. 25. s. 29. and 39 Geo. 3. c. 107. s. 25. repealing old and imposing new duties on bills of exchange, promissory notes and other notes, drafts and orders, and on receipts; and the stat. 35 Geo. 3. c. 63. s. 23. as to stamps on sea assurances, add here the words " *or mark;*" which also occurs in the subsequent part of the recited act. And the general consolidating act 27 Geo. 3. c. 13. s. 46. mentioned in the text, including all former acts, the 30 Geo. 2. c. 19. s. 27. as to deeds, newspapers, almanacks, and licences for wine, spirituous liquors, and ale, beer, &c., the 31 Geo. 3. c. 21. s. 5. as to game certificates, and the 34 Geo. 3. c. 14. as to indentures of clerkship to attornies, &c. add the words " *seal* or *mark.*"

(*c*) The statutes 31 Geo. 3. c. 25. s. 29. and 35 Geo. 3. c. 63. s. 23. abovementioned, add here the words " upon any vellum, parchment, or paper."

(*d*) The stats. 31 Geo. 3. c. 25. s. 29. and 39 Geo. 3. c. 107. s. 25. (which latter extends to stamps on bills of exchange and promissory notes for small sums of money) add the words " *or expose to sale,*" and so does the stat. 23 Geo. 3. c. 58. s. 11. which extends to all prior acts.

(*e*) The stat. 41 Geo. 3. c. 86. s. 16. granting additional stamp duties on cards and dice, probates of wills or letters of administration, certain indentures, leases, bonds, and other deeds, and ale licences, omits the words " *or fraudulently.*"

" or

Ch. XIX. § 16. *By statute. Of stamps.*

" or allowed to be used by this act, with intent to defraud " his Majesty of the said duties (*a*); then every person so " offending, and being thereof lawfully convicted, shall be " adjudged a felon, &c. without benefit of clergy."

10 Ann. c. 19. s. 97. *On silks, callicoes, linens, and stuffs.*

By the stat. 10 Ann. c. 19. s. 97. which directs the commissioners of the Customs to provide certain seals or stamps for imported linens, and the commissioners for managing the duties on silks, callicoes, linens, and stuffs, to be printed or dyed, &c. in Great Britain, to provide certain other seals or stamps for marking the same, enacts, that " if any person " shall counterfeit or forge any stamp or seal to resemble " any stamp or seal which shall be provided or made in pur- " suance of this act, or shall counterfeit or resemble the " impression of the same upon any of the commodities " chargeable by this act, thereby to defraud her Majesty, &c. " of any of the said duties hereby granted; every person so " offending, being thereof convicted in due form of law, shall " be adjudged a felon without benefit of clergy: And if any " person or persons shall during the continuance of this act " sell any printed, painted, stained, or dyed silks, callicoes, " linens, or other stuffs as aforesaid with a counterfeit stamp " thereon, knowing the same to be counterfeited, with an " intent to defraud her Majesty, &c. every such offender, " their aiders, abbettors, and assistants (being duly convicted " as aforesaid) shall for every such offence forfeit to her " Majesty, &c. 100*l.* and shall be adjudged to stand in the " pillory in some public place for two hours."

§ 17. 12 Geo. 3. c. 48.

Another general provision in regard to offences against the stamp laws is in the stat. 12 Geo. 3. c. 48. for the more effectual prevention of frauds in respect of stamp duties granted by several acts, which enacts, " That if any person " or persons, at any time after the first of August 1772, " shall write or engross, or cause to be written or engrossed, " either the whole, or any part of any writ, mandate, bond,

Writing or engrossing any writ, bond, &c. or other writing, matter, or thing

(*a*) The stat. 41 Geo. 3. c. 86. s. 16. last mentioned, adds here the words (as applicable to the subject-matter,) " or shall counterfeit or forge, or " cause to be counterfeited or forged, any mark or name provided by the " commissioners under this act for the wrapping or inclosing any dice, " or making any part of, or being affixed to such wrapper."

" affidavit,

Ch. XIX. § 17.

By statute. Of stamps.

" affidavit, or other writing, matter, or thing whatsoever, in " respect whereof any duty is or shall be payable by any act " or acts made, or to be made, in that behalf, on the whole, " or any part of any piece of vellum, parchment, or paper " whereon there shall have been before written any other " writ, bond, mandate, affidavit, or other matter, or thing, " in respect whereof any duty was or shall be payable as " aforesaid, before such vellum, parchment, or paper shall " have been again marked or stamped according to the said " acts; or shall fraudulently erase or scrape out, or cause " to be erased or scraped out, the name or names of any " person or persons, or any sum, date, or other thing, writ- " ten in such writ, mandate, affidavit, bond, or other writ- " ing, matter or thing as aforesaid; or fraudulently cut, " tear, or get off, any mark or stamp, in respect whereof, or " whereby, any duties are or shall be payable, or denoted " to be paid or payable as aforesaid, from any piece of vel- " lum, parchment, paper, playing cards, outside paper of " any parcel or pack of playing cards, or any part thereof; " with intent to use such stamp or mark for any other " writing, matter, or thing, in respect whereof any such " duty is or shall be payable, or denoted to be paid or pay- " ble as aforesaid; then, so often, and in every such case, " every person so offending in any of the particulars before- " mentioned, and every person knowingly and wilfully aid- " ing, abetting, or assisting any person or persons to commit " any such offence or offences as aforesaid, shall be deemed " and construed to be guilty of felony; and, being thereof " convicted by due course of law, shall be transported to " some of his Majesty's plantations beyond the seas for a " term not exceeding seven years, according to the laws in " force for the transportation of felons: And if any such " person or persons so convicted or transported, shall volun- " tarily escape or break prison, or return from transportation " before the expiration of the time for which he, she, or " they shall be so transported as aforesaid, such person or " persons being thereof lawfully convicted, shall suffer death " as a felon, without benefit of clergy, and shall be tried " for such felony in the county where he, she, or they shall " be apprehended."

whatsoever in respect of which any stamp duty is or shall be payable on any paper, &c. whereon was written any other writ, &c. before the same shall be stamped again; or fraudulently erasing, &c. and inserting other matter, &c. on the same stamp, or cutting off, &c. any stamp, with intent to use it for any other writing or aiding and abetting therein; felony and transportation.

Breaking prison, or returning from transportation, death.

Trial.

Ch. XIX. § 17. *By statute. Of stamps.*

By s. 2. "If any person or persons shall, after the 1st of "August 1772, commit any of the offences aforesaid, and "afterwards, being out of prison, discover one or more per- "sons who shall, since that time, have committed any of "the offences aforesaid, so as such person or persons disco- "vered shall be convicted of such offence or offences; he, "she, or they, so discovering, shall have and be entitled to "his majesty's gracious pardon for all such offences by him "or her committed at any time or times before such disco- "very made."

Vide Rex v. Field, 1 Leach, 426.

Pardon for offender making discovery of others.

But any fraudulent using of a legal stamp, which many of the above-mentioned offences may be deemed to be, is made capital by subsequent statutes, the 23 Geo. 3. c. 58. s. 11. and 27 Geo. 3. c. 13. s. 46. in the terms before expressed, which refer to all prior stamp acts.

Ante, 887.

§ 18. *Stamps on plate, &c.*

With respect to the forging and counterfeiting, or transposing of stamps on gold and silver plate, &c. the marks on which have been before adverted to in treating of offences relating to bullion, the stat. 12 Geo. 2. c. 26. s. 8. first made the offences punishable by a forfeiture of 100*l.*, or in default of payment by imprisonment. But the stat. 31 Geo. 2. c. 32. s. 14. reciting that the punishment prescribed by the former statute had not been found sufficient to deter offenders, repeals the former provision, and enacts (s. 15.) "That if any person whatsoever, after the 5th of July 1758, "shall cast, forge, or counterfeit, or cause or procure to be "cast, forged, or counterfeited, any mark or stamp used, or "to be used for making gold or silver plate, in pursuance "of the said act or of any other act or acts of parliament "now in force, by the company of Goldsmiths in London, "or by the wardens, or assayer or assayers, at York, Exter, "Bristol, Chester, Norwich, or Newcastle-upon-Tyne, or "by any maker or worker of gold or silver plate, or any or "either of them; or shall cast, forge, or counterfeit, or "cause or procure to be cast, forged, or counterfeited, any "mark, stamp, or impresssion, in imitation of, or to resemble "any mark, stamp, or impression, made or to be made with "any mark or stamp, used or to be used as aforesaid, by the "said company of Goldsmiths in London, or by the said "wardens,

Ante, 188, &c.

31 Geo. 2. c. 32. s. 15.

" wardens, or assayer or assayers, or by any maker or worker Ch. XIX. § 18.
" of gold or silver plate, or any or either of them; or shall *By statute. Of stamps.*
" mark or stamp, or cause or procure to be marked or
" stamped, any wrought plate of gold or silver, or any wares
" of brass, or other base metal silvered or gilt over, and re-
" sembling plate of gold or silver, with any mark or stamp,
" which hath been or shall be forged or counterfeited, at
" any time either before, on, or after the said 5th day of
" July, in imitation of, or to resemble any mark or stamp
" used, or to be used as aforesaid, by the said company of
" Goldsmiths in London, or by the said wardens, or assayer
" or assayers, or by any maker or worker of gold or
" silver plate, or any or either of them; or shall transpose
" or remove, or cause or procure to be transposed or re-
" moved from one piece of wrought plate to another, or to
" any vessel of such base metal as aforesaid, any mark, stamp,
" or impression, made or to be made by or with any mark
" or stamp used or to be used as aforesaid by the said com-
" pany of Goldsmiths in London, or by the said wardens,
" or assayer or assayers, or by any maker or worker of gold
" or silver plate, or any or either of them; or shall sell,
" exchange, or expose to sale, or export out of this king-
" dom, any wrought plate of gold or silver, or any vessel of
" such base metal as aforesaid, with any such forged or
" counterfeit mark, stamp, or impression thereon, or any
" mark, stamp, or impression, which hath been or shall
" be transposed or removed from any other piece of
" plate, at any time either before, on, or after the said 5th
" of July; knowing such mark, stamp, or impression to be
" forged, counterfeited, or transposed, or removed as afore-
" said; or shall wilfully and (*a*) knowingly have, or be
" possessed of any mark, or stamp, which hath been or shall
" be forged or counterfeited, (*b*) at any time, either before,
" on, or after the said 5th day of July, (*b*) in imitation of,
" or to resemble any mark or stamp used, or to be used as
" aforesaid, by the said company of Goldsmiths in London,
" or by the said wardens, or assayer or assayers, or by any
" maker or worker of gold or silver plate, or any or either

(*a*) The stat. 24 Geo. 3. st. 2. c. 53. s. 16. and 38 Geo. 3. c. 69. s. 7. have the word *or* instead of *and*, and the relative words between these letters (*b b*) are omitted.

" of

Ch. XIX. § 18. *By statute. Of stamps.*

" of them; every such person offending in any, each, or " either of the cases aforesaid, being thereof lawfully con- " victed, shall be adjudged guilty of felony, &c. without " benefit of clergy."

24 Geo. 3. st. 2. c. 53. s. 16.

The same provisions are re-enacted with respect to the duty mark of the king's head imposed by the stat. 24 Geo. 3. st. 2. c. 53. s. 16. including such mark imposed by the company of Goldsmiths in Edinburgh as well as London, and by the Birmingham or Sheffield company, as well as by the wardens and assayers at York, &c. and referring to the 1st of December 1784 instead of the 5th of July 1758. Then

38 Geo. 3. c. 69. *Vide* ante, p. 192.

the stat. 38 Geo. 3. c. 69. by which *gold wares* were allowed to be manufactured at a lower standard than was before allowed, viz. at the standard of 18 instead of 22 carats in a pound troy, enacts, s. 7. that from and after the 1st of October 1798 " if any person shall forge, cast, or counterfeit, " or cause or procure to be forged, &c. the mark or stamp " used or directed to be used *in pursuance of this act* for the " marking or stamping of *gold plate* by the company of Gold- " smiths in London or Edinburgh, or the Birmingham or " Sheffield company, or by the wardens, or assayer or assay- " ers at York, Exeter, Bristol, Chester, Norwich, or New- " castle-upon-Tyne, or any or either of them," &c. And then it follows verbatim the provisions of the former acts, excepting only that it does not extend as they do in general terms to the *makers and workers* of gold plate, as well as to the companies and assayers before mentioned: and also that it varies the description of the wares therein named to " any " *wrought plate of gold*, or any *wares of silver, brass, or other* " *metal gilt over and resembling plate of gold*," and then, in stead of making the offences capital, it concludes, that " every such person offending in any such or either of the " cases aforesaid, being thereof lawfully convicted, shall be " adjudged guilty of felony, and shall be transported for " seven years."

Vide note (*a*) in the last page.

It is singular that when this subject was under the review of the Legislature, and the punishment for the offences under this act limited to transportation, offenders ejusdem generis under the former act should be left subjected to capital punishment.

The

Ch. XIX. § 19.
By statute. Of stamps.

§ 19.
Construction of the stamp acts.

The following cases have occurred on the construction of the several stamp acts.

Holland Palmer was indicted on the 23 Geo. 3. c. 49. s. 20. which enacts, "that if any person shall forge or "counterfeit, or procure, &c. any stamp or mark directed "or allowed to be used by the act, for the purpose of de- "noting the duties aforesaid (therein mentioned) with in- "tent to defraud his Majesty; or shall fraudulently use any "of the said stamps or marks with the like intent; or shall "utter, vend, sell, or expose to sale *any paper liable to the* "*said duties* (*a*) with any counterfeit mark or impression "thereon, knowing, &c." he shall be guilty of felony without benefit of clergy.

Palmer's case, O. B. Dec. 1784, MS. Gould J. (1 Leach, 391. S. C.)

Indictment for uttering, &c. so many pieces of paper liable to the duty of 2d. (i. e. *on receipts*) *with a counterfeit impression thereon, held well; for it follows the description in the stat.* 23 Geo. 3. c. 49. s. 20. *and means such pieces of paper as are destined and prepared for receipts by having counterfeit stamps. Semble also sufficient if the indictment omit the words,* "liable to the said duty," &c.

The first count, after stating that a certain stamp was provided by the statute for stamping every piece of paper upon which any receipt, &c. upon the payment of money amounting to 2*l.* &c. was written with a stamp duty of 2*d.* &c. stated, that the prisoner intending to defraud the King of the duty on, &c. "unlawfully, fraudulently, and feloniously did utter and expose for sale to H. G. 1000 pieces of paper *liable to the said duty of* 2*d.* with a counterfeit impression upon each and every one of the said pieces of paper resembling the impression of the said stamp then and there used, according to the form of the statute, &c. he the Defendant at the said time of uttering, &c. well knowing the said impression on the said pieces of paper so by him uttered, &c. to be counterfeited; against the form of the statute; &c."

The 2d count was like the first, except that the words, *liable to the said duty of* 2*d.* were left out.

The prisoner being found guilty, a question was reserved for the opinion of the Judges, whether the indictment were sufficient under the statute? Ten Judges who met in Hilary term 1785 were all of opinion that the conviction was proper: and Gould J. who afterwards delivered their unanimous opinion at the O. B. in the February sessions following, said that the difficulty arose from the penning of the act of

(*a*) The stat. 30 Geo. 2. c. 19. s. 27. and 32 Geo. 2. c. 25. s. 8. requiring stamps on affidavits, &c. have the same words.

parliament,

Ch. XIX. § 19. *By statute. Of stamps.*

parliament, and not from the indictment, which seemed to be properly drawn. The objection was founded on the supposed inaccuracy of the sentence, "*paper liable to the* "*duties*," which in this case the indictment had properly and necessarily applied to the particular duty in question, namely, the duty of 2*d.* on receipts. It had been asked what was meant by *paper liable to the duties;* and how could one piece of paper be said to be liable to any of the duties more than another? But that an attentive consideration of the act in question, together with a subsequent statute, 24 Geo. 3. c. 7. in pari materiâ would help to make it clear: and that from a collection of passages in the two acts it would appear that those words were not to be taken in the large and absurd sense of all the pieces of paper on which receipts and the other instruments mentioned in the 23 Geo. 3. might be written; but such pieces as were destined or prepared for those uses: if genuine, then such as by the 14th sect. were ordered to be brought to the office to be stamped before they were written upon: if false, then such pieces of paper as having stamps resembling the true ones upon them purported to be papers duly stamped, and as such liable to the said duties. That it was to be observed, that section 14th of 23 Geo. 3. c. 7. expressly required that the papers on which the instruments were to be written should be first duly stamped, and the stat. 24 Geo. 3. c. 7. made the writing of the instrument upon it penal (by a forfeiture of 5*l.*) if it were not so, or unless a stamp resembling the true one appeared upon it; (a most equitable exemption if the party were innocent.) When that deception appeared upon the face of the paper, the parties giving and taking it (being innocent) were persuaded that it was duly stamped; and if afterwards the fraud were detected, every one must say that the paper being prepared and destined for a receipt to be written upon it, was liable to the duty signified by the counterfeit mark, and ought to have been stamped accordingly. It appeared to the Judges therefore that the words "paper liable to the "said duties" were to be applied according to the subject matter to such paper which from the counterfeit mark upon it appeared to be prepared to be used as if the mark were genuine for a receipt, and consequently was liable to the duty.

24 Geo. 3. c. 7.

It

Ch. XIX. § 19.

By statute. Of stamps.

It also seemed to some of the Judges on the conference in the above case, that the second count which omits the words "liable to the said duties," was sufficient; for it was a charge of fraudulently uttering, &c. paper with a counterfeit impression resembling the said stamps used in pursuance of the statute, knowing, &c.; and this in substance was a charge of its being paper denoted by the said impression to be destined for writing receipts, and as such being paper liable to that duty.

Hall and Crutchfield were indicted for forging a stamp on foreign muslins printed, &c. here, with intent to defraud the King of the duty. Crutchfield being convicted, judgment was respited on two objections taken by his counsel; 1. That the offence was originally created by 25 Geo. 3. c. 72. s. 17. by which the duties for securing of which the stamps were provided were imposed. That by 27 Geo. 3. c. 13. s. 35. all the former duties are repealed except duties due and penalties and forfeitures incurred at the time of passing that act: and therefore it was argued that all penalties were annihilated unless re-enacted. That this as well as all preceding statutes took a distinction between *duties of Excise* and duties *under the management of the commissioners of Excise;* according to what was observed by Mr. Justice Ashhurst in Rex v. The Justices of Surry, 2 Term Rep. 504. That section 38. of the latter statute states that "all pains, "penalties, fines, and forfeitures of any nature or kind "whatsoever, as well pains of death as others, for any "offence in force before 10th May 1787, made for securing "the Revenue of Excise or other duties under the manage- "ment of the commissioners of Excise, &c. shall extend to "and be applied for and in respect of the several *duties of* "*Excise*, and allowances, bounties, and drawbacks of duties "of Excise thereby charged and allowed (*a*)," &c. That therefore those penalties and pains of death being re-enacted only so far as they relate to *duties of Excise* and not to duties or sums *under the management of the commissioners of Excise*, (which was the case with respect to the duty in question,) they could not be revived by construction, but being so highly

Hall & Crutchfield's case, O. B. 1795, MS. Buller J. and MS. Jud. *The stat.* 27 G. 3. c. 13. s. 35. *repealing former duties on foreign muslin printed here, and enacting others in their stead; and providing by* s. 38. *that all pains, penalties, fines, and forfeitures, as well of death, as others, for any offence in breach of former acts made for securing the revenue of* excise *or* other duties under the management of the commissioners of excise, *should extend to the several* duties of excise, *thereby charged; re-enacts the penalty of forging the stamps on such foreign muslin, printed here; though the duty thereon is not denominated a duty* of excise *but a duty* under the management of the commissioners of excise.

(*a*) See also s. 46. before referred to, ante, 27.

penal

Ch. XIX. § 19. *By statute. Of stamps.*

penal must be specially re-enacted. 2. That the indictment did not pursue the words of the statute. The words of the 25 Geo. 3. c. 72. s. 17. are, "if any person shall forge, &c. any "stamp to resemble any stamp provided to denote the charg- "ing of the duties *on* the said muslins," &c. The 2d clause of the statute which imposes the duties says, "*for and upon* all "muslins," &c. The st. 27 Geo. 3. which repeals the former duties and imposes others, has in sect. 36. these words; "there shall be raised *upon* the goods mentioned in the "schedule," &c. The schedule itself says *for* every yard of foreign muslin, &c.; whereas the indictment states the intent to defraud the King of certain duties chargeable *for, on, and in respect of* foreign muslin; and that the prisoner counterfeited a stamp to denote the payment of duties *for, on, and in respect of*, &c. which it was contended was a variance from the words creating the offence; and recites the words by which the duty is charged erroneously; for though the words used in the indictment are to be found in the 36th section of 27 Geo. 3. they refer only to drawbacks of duties imposed, and not to the imposition of the duties themselves.

The indictment stating the duty to be chargeable for, on, and in respect of foreign muslin, &c. is sufficient; though the words of the statute imposing the duty are "for and upon," in some clauses "for," in others "on," in others "upon."

In Easter term 1795, ten Judges present, all over-ruled the objections, and held the conviction proper. Eyre C. J. thought that the naming of *duties of Excise* and *duties under the management of the commissioners of Excise*, was tautology. But all held it clear, that the expressions were used as synonymous in this act; adverting to schedule F, in which the duties on muslins are denominated "duties of Excise." The other objection was not thought worth urging.

Vide R. v. Baxter, 5 T. Rep. 83. and 2 Hawk. ch. 25. s. 102.

5. *Official Papers, Securities, and Documents.*

§ 20. 39 Eliz. c. 17. s. 3. *Testimonials of soldiers and mariners.*

By stat. 39 Eliz. c. 17. s. 3. "Every idle and wandering "soldier or mariner who coming from his captain from the "seas or from beyond the seas shall not have a testimonial "under the hand of some one justice of the peace of or near "the place where he landed, setting down therein the "place and time when and where he landed, and the place "of his dwelling or birth unto which he is to pass as afore- "said, (referring to s. 2.) and a convenient time therein "limited for his passage:" "and also as well every such "idle

" idle and wandering soldier or mariner, as every other idle " person wandering as soldier or mariner, who shall forge or " counterfeit any such testimonial, or have with him or " them any such testimonial forged or counterfeited as " aforesaid, knowing the same to be counterfeited or forged; " every such act or acts to be felony, without benefit of " clergy."

Ch. XIX. § 20. *By statute. Of testimonials of soldiers, &c.*

By s. 2. the justices of assize, of gaol delivery, and of the peace, are directed *to execute* the offenders convicted before them, except some honest person valued at the last subsidy to 10*l.* in goods, or 40*s.* in lands, or else some honest freeholder shall agree to take the felon into his service for a year in the manner there mentioned.

Vide tit. *Vagrancy.*

§ 21. 2 & 3 Ann. c. 4. *Forging memorial or certificate of deeds or wills of land, &c. registered in the W. R. of Yorkshire, subjected to pains and penalties of* 5 Eliz. c. 14. post.

The stat. 2 & 3 Ann. c. 4. " for the public registering of " all deeds, conveyances, and wills of any honors, manors, " lands, tenements, or hereditaments within the West Riding " of the county of York, after the 29th of September 1704," directs a memorial of all such to be registered in a certain manner at Wakefield, and that the registrar shall indorse a certificate of such registry on every such deed, &c. Then by s. 19. " If any person or persons shall forge or coun- " terfeit any such memorial or certificate as are therein " before mentioned and directed, and be thereof lawfully " convicted, such person or persons shall incur and be liable " to such pains and penalties as by the stat. 5 Eliz. c. 14. " are imposed upon persons for forging or publishing of " false deeds, &c. whereby the freehold or inheritance of " any person in lands, &c. may be molested," &c.

Extended to bargains and sales by 5 Ann. c. 18.

The stat. 5 Ann. c. 18. directs that all bargains and sales of any manors, lands, tenements and hereditaments within the West Riding of the county of York shall be registered at Wakefield, and indorsed by the registrar; that the inrolment of every such deed shall be deemed a memorial pursuant to the last-mentioned act; and by s. 4. no judgment, statute, or recognizance shall bind any manors, lands, &c. but only from the time a memorial thereof shall be registered in the office. Then s. 8. subjects to the same punishment as the former act " any person or persons who shall forge " or counterfeit any entry of the acknowledgment of any

Ch. XIX. § 21. *By statute. Of registers in Yorkshire.*

" bargainer in any such bargain and sale as aforesaid, or any " such memorial, certificate, or indorsement as are therein " mentioned or directed, being thereof lawfully convicted."

8 Geo. 2. c. 6. *North Riding.*

The stat. 8 Geo. 2. c. 6. s. 31. extends the provisions of both statutes to the North Riding of the same county.

7 Ann. c. 20. *Middlesex.*

And the stat. 7 Ann. c. 20. which directs the like registry of deeds, conveyances, and wills, and other incumbrances affecting honors, manors, lands, &c. in the county of Middlesex, as in stat. 2 & 3 Ann., and directs certificates to be indorsed on such memorials, and on the deeds, &c. registered, by s. 15. inflicts the like punishment on persons who shall " forge or counterfeit any entry of the acknow- " ledgment of any such memorial, certificate, or indorse- " ment as is therein mentioned or directed, being thereof " lawfully convicted."

§ 22. 12 Geo. 1. c. 32. s. 9. *Documents relating to the money of suitors in Chancery.*

By the act for better securing the money of the suitors in Chancery, lodged in the Bank, or directed to be laid out in government or other securities there mentioned, (s. 9.) " If " any person or persons forge or counterfeit, or procure to be " forged or counterfeited, or willingly act or assist in the forg- " ing or counterfeiting the name or hand of the said Accomp- " tant-General, (i. e. of the court of Chancery,) the said re- " gister, the said clerk of the report office, or any of the " cashiers of the said governor and company of the Bank of " England, to any certificate, report, entry, indorsement, de- " claration of trust, note, direction, authority, instrument, or " writing whatsoever, for or in order to the receiving or ob- " taining any the money or effects of any of the suitors of the " said court of Chancery, or shall forge, or counterfeit, or " procure, &c. or wilfully act or assist in forging, &c. any cer- " tificate, report, &c. (ut supra) made by such Accomptant- " General, register, clerk of the report office, or any of the " cashiers of the said governor, &c.; or shall utter or pub- " lish any such knowing the same to be forged or counter- " feited, with intent to defraud any person whatsoever; " every such offender being thereof lawfully convicted shall " be adjudged guilty of felony without benefit of clergy."

James

Ch. XIX. § 22.
By statute. Of documents of suitors in Chancery.

James Gibson was indicted on the above statute for forging a writing purporting to be *an office copy of a report of the Accomptant-General* of money being paid into the Bank pursuant to an order of Chancery, and also *an office copy of a certificate of one of the cashiers of the Bank* of the payment of the money into the Bank. The second count was for publishing the same knowing them to be forged, with intent to defraud, &c. The third and fourth counts were the one for forging, the other for publishing a writing in form of a writing purporting to be *an office copy of the certificate of the Accomptant-General* and *an office copy of the receipt of the cashier of the Bank*. There were other counts in the indictment, of which the Defendant was acquitted. The certificate and receipt were set out verbatim in all the counts; and the offence was laid to be done with intent to defraud William Hunt.

Gibson's case, Mich. 8 Geo. 3. in the Exchequer-chamber; and tried at the O. B. 1766, cor. Lord C. B. Parker, Gould and Yates Justs. MS. Buller J. (1 Leach, 72. S. C.)
Forging a paper writing purporting to be an office copy of a report of the Accomptant-General *of money being paid into the Bank (or as laid in another count an* office copy *of the* certificate of the Accomptant-General), *and also* an office copy *of a* certificate of one of the cashiers of the Bank, *(or as laid in another count* an office copy of the receipt of the cashier, &c.) *is within the stat.* 12 Geo. 1. c. 32. s. 9.

At the trial a special verdict was found, stating as to the 1st and 4th counts that divers sums of money since the stat. 12. Geo. 1. had been paid into the Bank by the order of the court of Chancery, and that the party paying the same had taken from one of the cashiers of the Bank a writing subscribed with his hand, the form of which the jury found in terms. That the person paying the money into the Bank had carried such writing to the Accomptant-General who had thereupon made a certificate under his hand, the form of which was also found in terms; and that the Accomptant-General had filed the same and the cashier's receipt at the report office; and that the clerk of the report office had made copies of them for the party paying the money into the Bank, and for any other person desiring it: and that such copies were read as evidence in Chancery of the money being paid into the Bank, and of such writings signed by the Accomptant-General and the cashier of the Bank being filed in the report office; *but that such copy was never signed by the said clerk of the report office, nor had the same any mark or signature to denote its being made in that office, excepting that the word* "EXAMINED" *was always subjoined to such copy by some clerk in the report office.* That the clerk of the report office never delivered out any thing touching the payment of money into the Bank except such office copy; but applications were frequently made at the report office to search for the original writings

Ch. XIX. § 22. *By statute. Of documents of suitors in Chancery.*

writings signed by the Accomptant-General and cashier of the Bank; and the clerk of the report office made and delivered out to any person desiring it copies of all decrees, reports, orders, and writings filed in that office. The jury then found that there was a certain cause instituted in the court of Chancery, and a bill of revivor in the same cause. That Hunt was appointed receiver of the rents of the premises, (to compel a sale of which the bill was brought); and that he remitted 437*l.* 16*s.* 7*d.* to be paid into the Bank to the credit of the cause, and that Gibson received it. That Gibson forged the writing (*a*) set forth in the first count with intent to defraud Hunt, and uttered and published the said writing with intent to defraud, &c. knowing the same to be forged; which writing was in form of an office copy made by the clerk of the report office of such writings subscribed with the hands of the Accomptant-General and one of the cashiers of the Bank. That at the time of forging the said writing Richard Rainsford was clerk of the report office, Thomas Anguish accomptant-general, and Benjamin Sabberton cashier. That the said forged writing purports to be an office copy made by the said R. Rainsford as such clerk of the report office of a writing subscribed with the hand of the said Thomas Anguish, as accomptant-general, and also of a writing subscribed with

(*a*) The writings in question are thus set forth in Mr. Leach's report; "20th of February 1764, Between Robert Lee Esq. and Christopher D'-"Oyley Esq. executors of Sir George Browne Baronet, Plaintiffs, and Ro-"bert Pringle Esq. and others, Defendants. By original and supplemental "bills, and bills of revivor. I do hereby certify, that pursuant to an order "dated the 13th of February instant, Mr. William Hunt, the receiver, "hath paid into the bank of England the sum of 437*l.* 13*s.* 7*d.* which is "placed to my account as Accomptant-General, and to the credit of the "cause of Browne against Pringle, in Master Bennett's office; as appears "by the receipt of Mr. B. Sabberton, one of the cashiers of the Bank, "dated the sixteenth instant, hereto annexed. (Signed) T. Anguish, Ac-"countant General, London."

"London, the 16th of February 1764. Received of Mr. William Hunt, "the receiver, the sum of 437*l.* 13*s.* 7*d.* pursuant to an order dated 13th "Feb. instant, made in the cause of Lee against Pringle, which money is "placed to the account of Thomas Anguish Esq. as Accountant General "of the Court of Chancery, and to the credit of the cause of Browne "against Pringle, in Master Bennet's office, in the books kept at the Bank "for the suitors of the said court of Chancery. For the Governor and Co. "of the Bank of England, 437*l.* 13*s.* 7*d.* entered.——B. Sabberton."

"T. Cradwell examined."

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Ch. XIX. § 22. *By statute. Of documents of suitors in Chancery.*

the hand of the said Benjamin Sabberton as cashier. That the money was not paid into the Bank, nor did such writing ever exist as the said forged writing purports to be an office copy of. That the forged writing was sent to Hunt; and he believing the same to be a true office copy, afterwards remitted more money to Gibson to be paid into the Bank in the same cause, which he would not have done if he had not believed the said office copy to be a true one. But whether on the whole the writing so forged, counterfeited, attested, and published by the said James Gibson as aforesaid be a writing in form of a certificate, report, entry, &c. (the words of the act) within the meaning of the said act, the jurors were ignorant, and so prayed the advice of the Court. And if, &c.

The special verdict was argued (*a*) in the Exchequer-chamber in Mich. term 8 Geo. 3. before ten Judges, when it was contended for the prosecution (*b*) that the forged writings in question were within the statute, the object of which was the security of the suitor's money. That every authentic certificate was comprehended within it, to which the hand of the Accomptant-General was necessary. And it was intended that the different offices should be a check upon one another, and in this case the report office was a check upon the Accomptant-General. The act considered the report office as the public repository where all these documents were deposited, and the only evidence the party had was the copy of the particular document lodged there: and therefore in the first instance it was felony to forge the name or hand of the Accomptant-General with an intention to receive the suitor's money. The next clause was still more penal, upon which the indictment was founded. 1. As to the nature of *an office copy*. In every court of justice there is a proper officer appointed, in whom the court confides, to make authentic copies of its proceedings, and the originals

(*a*) As there is no account in the note of the particular grounds on which the case was decided, I have thought it necessary to state the arguments of the counsel at some length.

(*b*) Some trifling informalities were remarked in the drawing up of the special verdict, which were reserved for future consideration, if they should be found weighty enough to raise a doubt.

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Ch. XIX. § 22. *By statute. Of documents of suitors in Chancery.*

are deposited with him for the benefit of the public; and such office copies are equivalent to the records themselves of the court. The clerk of the report office is the confidential officer of the court of Chancery, and copies under his hand are read in the same cause without any further evidence; and this is a form of an office copy made under the hand of that officer, and in the same cause then before the court. The jury have found that Hunt was the receiver, and that Gibson received the money for which this certificate was forged, and that it was in the form of a certificate. 2. As to the nature of the prisoner's offence. He is found guilty of forging and publishing these authenticated office copies with an intention to defraud the receiver: and it is found that Hunt, confiding in this forged office copy, remitted further sums, which he would not otherwise have done: and it is clear that this was done to defraud. It may be asked *cui bono* could the prisoner forge a copy of that of which there was no original? But that is answered by saying, that every forgery is intended to carry the appearance of a true transaction in itself, while it carries evidence of facts which are false; and it is no alleviation of the offence that the party has forged that which could not be true; for the criminal intent which is found was to defraud and impose upon Hunt. 3. The forgery is within the words of the act; for it is *a writing in form of a writing made by the clerk of the report office*, as the jury have found. The Legislature meant to include every kind of writing, and leave the criminality of the intention to the determination of the jury. But, 4. It is as much within the meaning as the words of the act, which meant to take in all documents whatsoever, and to protect the suitor's money as well before as after it is brought into court; and all the documents are repeated in the penal clause. The only way of deceiving was to send an *office copy*, as the Defendant did. This was suitor's money, and therefore expressly within the act: though it would have been sufficient if done to defraud any person. 5. Though the special verdict finds that any person may have an office copy, that does not weaken the authority of the instrument. Nor, 6. does the circumstance that it has no office mark, except the word "*examined*," though it might weigh as a reason with the Judge who presides in Chancery to direct that

that there should be some other signature. But hitherto there never has been any other mark, and the Court has confided in its officer, marking it as *examined:* and the copy in question might have been read without any dispute in any cause, and in the particular cause was equal (if genuine) to the original itself, without proving it to be an examined copy, which is only necessary where the copy is produced in other causes.

For the prisoner two questions were made; 1. Whether this were such a forgery as is within the statute. 2. If the finding of the jury were sufficient. 1. The difference of the papers mentioned in the 1st and 4th counts is, that in the first count the paper is called "an office copy *of a report* "*of the Accomptant-General,*" and "an office copy *of the* "*certificate of the cashier,*" and in the fourth count it is called "an office copy *of the certificate of the Accomp-* "*tant-General,*" and "an office copy *of the receipt of the* "*cashier.*" And the argument for the Crown is, that the words "*instrument or other writing*" can mean nothing unless they comprehend the present writing. But there are several writings mentioned in the act, which are not recapitulated in the penal clause, such as the *intratur*, the *authority*, and the *counter-signing by the Master*. The act could not mean the forging the office copy of any writing whatever, but only a writing in form of some original instrument supposed to be made by one of the officers named in the act, and which (if genuine) would be authentic under the provision of the act itself: for no practice of the court of Chancery in allowing or rejecting an office copy to be evidence can affect the question; for that would be to make the exposition of a penal statute depend upon matters collateral, and become uncertain from variable rules at the discretion of the court of Chancery. The object of the Legislature was to protect the suitors against fraud; which would have been frustrated by making an office copy evidence of its contents. All the instruments enumerated in the penal clause are provided for, and their several officers assigned them in the preceding parts of the act; but there is no mention of *an office copy* of any kind. An office copy bears no marks of authenticity; it is signed by no body, and procureable by any body upon asking for it and paying the fees:

but

Ch. XIX. § 22. *By statute. Of documents of suitors in Chancery.*

but the original which is deposited in a certain place is signed by the proper officer, and is authentic evidence; and therefore it cannot be supposed that the court of Chancery would rely upon such a copy which had no evidence of authenticity. It is said the words "*writing in form of a writing*" have a general signification; but that would extend the clause beyond what it is possible the Legislature could mean; for then every private instrument of these officers fabricated with intent to defraud would be within the penal clause. Neither can it extend even to things supposed to be made by them virtute officii; for if so, a forged copy of a *decree* made with a design to defraud would be within the act; which could not be, as it would have no relation to the design for which the act was framed, which only meant to prevent frauds in obtaining the money of suitors out of court. As if one forged a supposed office copy of a decree upon which he was to receive 1000*l.*, upon the credit of which he borrowed money; this could not come within the act; and yet it would be "*a writing* in form of a writing," signed by the proper officer, with intent to defraud. To forge or counterfeit imports in its nature a similitude to something that exists, a resemblance of or design to resemble the hand of some other person whose name or character it bears: but this bears no name, no signature, no mark to denote its being any writing made by Mr. Rainsford, the clerk of the report office, rather than of any of his under clerks, or indeed to have been made in that office at all. It is notorious that none of these copies are even supposed to be made by the superior officer, and so the verdict states. It is not said in the indictment that this was suitors' money, or that Hunt was the receiver, or that there was any cause depending, or any order to pay the money into court. 2dly, As to the finding of the jury: It was necessary that there should be a cause depending, and an order for the payment of the money; but no such order is found by the verdict; and without it the cashier of the Bank could not receive, nor the Accomptant-General take any account; and there can be no intendment that there was such an order. Plummer's case, Kel. 111. The verdict only states, that Gibson having the money in his hands (received honestly and without fraud), this writing was forged with intent to defraud

defraud Hunt, and that the money was never paid into the Bank, and that such writing (of which this is a supposed copy) never existed. It could be no fraud not to have paid the money without an order, and nothing is found from whence any intention of fraud can be inferred. The money, being lawfully received, was lawfully retained by Gibson, because he had no authority to pay it into the Bank without an order from the court. Therefore, if there were an intention to defraud by means of this paper, however criminal it might be, it is no offence within the act; for the act supposes the money to have been paid into the Bank, which this never was. Supposing Hunt had remitted the money to Gibson for another purpose, and he for the sake of retaining it, had pretended to Hunt by doing this act that he had applied it in that manner, would that have been within the act? The finding that Hunt upon the credit of this afterwards remitted more money is immaterial, for it is not even found that Gibson received it.

Ch. XIX. § 22. *By statute. Of documents of suitors in Chancery.*

In reply it was observed, that the *authority* was expressly mentioned in the penal clause, and so was the *intratur*, which was no more than the entry of the name. Admitting that the object of the act was the security of the suitors' money, yet it was not only meant to secure it when paid in, but also *in transitu*, and in the hands of any person, provided it could fall under the denomination of *suitors' money*. That the admission of office copies in evidence did not depend on the practice of the court of Chancery, but was the common law of the kingdom; and therefore it was no answer to say that it would open a door to fraud. That the true question was, whether this were such an instrument as would be authentic, if made by the officer in his office, and in which he was entrusted by the court for the purpose. That admitting that the writing had not the resemblance of an *original* writing, yet it had the form and appearance of an *office copy;* and any thing that had the form and appearance of an office copy was evidence in itself. That it was not true that no person was liable to be defrauded in this case; for the receiver was deceived by it, and remitted the prisoner a further sum on the credit of it. That the indictment was founded on the last branch of the penal clause of the act, and expressly

Ch. XIX. § 22. *By statute. Of documents of suitors in Chancery.*

charged that the prisoner forged a paper writing purporting to be a receipt signed by the Accomptant-General. As to there being no order found to pay the money into court, it constituted part of the offence complained of; for if the prisoner, as part of the contrivance to defraud, had previously instructed counsel to move for an order, that could not have altered the law: but as the matter stood, it added another falsehood to the offence committed. Neither was it necessary to aver in the indictment that a cause was depending, if the case were within the last branch of the penal clause; for that punishes the act if done to defraud any person generally.

After the argument Lord Mansfield C. J. observed, that the verdict left but one question to consider, which was, whether the offence were within the act. That if they had any doubts, the Judges would appoint it to be argued again the next term; otherwise they would determine the matter among themselves. Accordingly, in Hilary term following, eleven (One place was vacant.) Judges met at Serjeants'-Inn, and were of opinion that the indictment and verdict were sufficient and needed no amendment, and that the case of the prisoner was within the act of parliament.

§ 23. 4 Geo. 2. c. 18. *Mediterranean pass.* *Vide* Report on Temporary Laws by Committee of House of Commons, page 17.

In reference to the treaties between this kingdom and the Barbary powers, by which on producing a pass in a certain form the latter agree to let British vessels go free, the stat. 4 Geo. 2. c. 18. enacts, "that if any person or persons "shall within Great Britain or Ireland, or any other his "Majesty's dominions, or without, falsely make, forge, or "counterfeit, or cause or procure, &c. or wittingly or know-"ingly act or assist in the false making, &c. any pass or "passes for any ship or ships whatsoever, commonly called "a Mediterranean pass or passes, or shall counterfeit the "seal of the said office, (i. e. of Lord High Admiral) or the "hand or hands of the Lord High Admiral of Great Bri-"tain and Ireland, or of any commissioner or commis-"sioners for executing the said office to any such pass or "passes; or shall alter or erase any true or authentic pass "or passes issued or made out by the Lord High Admiral, "&c. or the commissioners, &c.; or shall utter or publish "as true any such false, forged, counterfeited, altered, or "erased

" erased pass or passes, knowing the same to be false, &c. Ch. XIX. § 23.
" or erased; every such person or persons, being duly con- *By statute. Of Mediterranean passes.*
" victed of any of the offences aforesaid in any proper court
" of Great Britain, Ireland, or any of his Majesty's Planta-
" tions beyond the seas, where such offence shall be com-
" mitted respectively, shall be adjudged guilty of felony
" without benefit of clergy."

By s. 2. such offences " committed in any country or *Trial.*
" place out of Great Britain, either within or without the
" dominions of his Majesty, his heirs, &c. shall and may be
" inquired of, tried, &c. and adjudged in any shire or
" county of Great Britain by virtue of the King's commis-
" sion of oyer and terminer and gaol delivery, or before any
" court of justiciary in Scotland," &c.

The forging or making false entries in marriage registers, § 24.
or marriage licenses, &c. which were punishable as misde- *Marriage register license, &c.*
meanors at common law, and are made capital felonies by 26 Geo. 2. c. 33.
stat. 26 Geo. 2. c. 33. s. 16. have been shewn before. Ante, 477.
Dudley's case, 2 Sid. 71.

By stat. 31 Geo. 2. c. 10. s. 24. " Whosoever willingly § 25.
" and knowingly shall personate or falsely assume the name *Seamen's wills, &c.*
" or character of, or procure any other to personate or 31 Geo. 2. c. 10.
" falsely to assume the name or character of, any officer, s. 24.
" seaman, or other person entitled, or supposed to be enti- *Personating seaman, &c his executor, wife, relation, or creditor, in order to receive his wages, &c. or forging letter of attorney, &c. or other authority to receive the same, or uttering or publishing such, &c. death.*
" tled, to any wages, pay, or other allowances of money, or
" prize money, for service done on board of any ship or
" vessel of his Majesty, his heirs, &c.; or the executor or
" administrator, wife, relation, or creditor, of any such
" officer or seaman, or other person, in order to receive any
" wages, pay, or other allowances of money, or prize money,
" due or supposed to be due or payable, for or on account of
" the services of any such officer or seaman or other person,
" as aforesaid; or shall forge or counterfeit, or procure to be *Vide* the next chapter, s. 3, 4.
" forged, &c. any letter of attorney, bill, ticket, certificate,
" assignment, last will, or any other power or authority *Vide* 32 Geo. 3.
" whatsoever, in order to receive any such wages, &c. due c. 33. as to the instruments named.
" or supposed to be due to any such officer, &c.;" or by
stat. 9 Geo. 3. c. 30. s. 6. " if any person shall utter or 9 Geo. 3. c. 30.
" publish, as true, any false, forged, or counterfeited letter s. 6.
" of attorney, bill, &c. (as before) in order to receive any *Uttering or publishing the same.*

" wages,

Ch. XIX. § 25. *By statute. Of seamen's wills, powers, &c.*

" wages, &c. due or supposed to be due to any officer or " seaman or other person, who has really served or was " supposed to have served, or who shall hereafter serve or " be supposed to have served on board of any ship or vessel " of his Majesty, his heirs, &c. with intent to defraud any " person, knowing the same to be false, forged or counter- " feited;) every such person so offending, being lawfully con- " victed of any such offence or offences, shall be deemed " guilty of felony without benefit of clergy."

Most of these offences were before subjected to a penalty of 200*l.*, and imprisonment till payment by stat. 9 & 10 W. 3. c. 41. s. 3.

By s. 5. of the last-mentioned act, the treasurer, comptroller, surveyor, clerk of the acts, or any commissioner of the navy may act as justices of the peace in causing the offenders to be apprehended.

32 Geo. 3. c. 33. s. 23. *Extends to tickets for wages of marines as well as seamen.*

By stat. 32 Geo. 3. c. 33. s. 23. " If any person after " the 1st of August 1792 shall falsely make, forge, or coun- " terfeit, or cause or procure to be falsely made, forged, or " counterfeited, or willingly act and assist in the false mak- " ing, forging, or counterfeiting any ticket for the wages or " pay due to any petty officer or seaman, non-commissioned " officer (*a*) of marines, or marine, for his services on board " any ship or vessel of his Majesty, his heirs, &c. or any " duplicate of any such ticket, or any certificate of discharge " from any naval hospital of his Majesty, his heirs, &c.; or " any remittance bill, or duplicate of remittance bill; with " intention to receive any wages, pay, or other allowances " of money, or prize money, due, or supposed to be due, " for or on account of the service of any petty officer or " seaman, non-commissioned officer of marines, or marine " on board any ship or vessel of his Majesty, his heirs, &c.; " or shall utter or publish as true any ticket for the wages " or pay due to any petty officer or seaman, non-commis- " sioned officer of marines, or marine, for his service on

(*a*) By s. 8. of stat. 32 Geo. 3. c. 34. inferior or petty officers and seamen and non-commissioned officers of marine or marines, named in that and former acts, are to be understood of all the complement of a ship excepting such as are rated admirals or flag officers and their secretaries, captains and lieutenants, masters, second masters and pilots, physicians, surgeons, chaplains, boatswains, gunners, carpenters, and pursers, captains of marines, and captain-lieutenants, lieutenants, and quarter-masters of marines.

" board

"board any ship or vessel of his Majesty, his heirs, &c.; or "any duplicate of any such ticket, or any certificate of dis- "charge from any naval hospital of his Majesty, his heirs, "&c.; or any remittance bill, or duplicate of remittance "bill; with intention to receive any wages, pay, or other "allowances of money, or prize money, due, or supposed "to be due, for or on account of the service of any petty "officer or seaman, non-commissioned officer of marines, or "marine, on board of any ship or vessel of his Majesty, his "heirs, &c. knowing the same to be false, forged or coun- "terfeited; then every such person so offending, being "lawfully convicted of any such offence or offences, shall "be deemed guilty of felony without benefit of clergy."

Ch. XIX. § 25. *By statute. Of seamen's and marines' tickets, bills, &c.*

By s. 24. it is expressly declared, that so much of the stat. 31 Geo. 2. c. 10. as is not repealed by this act shall remain in force.

So much of 31 Geo. 2. c. 10. *not repealed, to remain in force.*

In further aid of these provisions the stat. 26 Geo. 3. c. 63. has provided that no letter of attorney of any petty officer or seaman, or of their executors or administrators empowering any person to receive their wages, pay, or allowance of money of any kind for service due or to grow due, shall be valid, unless made revocable; and that no letter of attorney or will of such petty officer or seaman disposing of the same wages, &c. shall be valid; unless (if made in actual service) signed before and attested by the commanding officer of the ship, &c. or other persons therein named (if made on shore); and certain other forms are also directed to be pursued. These provisions are extended to marines by stat. 32 Geo. 3. c. 34. which also directs (s. 2.) that no letter of attorney or order made by any petty officer, seaman, non-commissioned officer of marines, or marine, who shall have been discharged from the service, and who shall be within seven miles of a port where seamen's wages are paid, shall be valid, unless it be signed before and attested by a clerk of the treasurer of the navy at such port, or by the inspector of seamen's wills and powers of attorney. It also gives a certain form of discharge called a certificate, which the party must produce, or his person be identified, before he can receive his wages, &c. or before any his letter of attorney can be passed. Orders may be given by seamen, &c. in the form

Regulations by 26 Geo. 3. c. 63.

32 Geo. 3. c. 34.

Ch. XIX. § 25. form prescribed for any sum not exceeding 7*l.*; and various other forms are prescribed for different methods of paying these persons; and then by s. 29. (32 Geo. 3. c. 34.) "if "any person, after the 1st of August 1792, shall falsely "make, forge, or counterfeit, or cause or procure to be "falsely made, &c. or willingly act and assist in the false "making, &c. any petition for a certificate therein-before "described or mentioned, to enable any person or persons "to obtain letters of administration to any petty officer or "seaman, non-commissioned officer or private of marines, "who shall have served on board any ship or vessel of his "Majesty, his heirs, &c. or shall utter or publish as true, "any such petition, &c. or shall falsely make, forge, or "counterfeit, or cause or procure to be falsely made, &c. or "willingly act and assist in the false making, &c. any cer- "tificate for enabling him, her, or them to obtain probate, "or letters of administration, with the will annexed; or any "check, remittance bill, or duplicate of remittance bill, or "any certificate to the deputy paymaster, in respect of "wages, prize money, and other allowances of money, not "exceeding ten pounds, herein-before severally described "or mentioned, in order to receive any wages, pay, or "other allowances of money, or prize money, due or sup- "posed to be due for or on account of the service of any "petty officer or seaman, non-commissioned officer, or pri- "vate of marines, on board any ship or vessel of his Ma- "jesty, his heirs, &c.; or shall utter or publish as true any "such check, &c. in order to receive any wages, &c. due "or supposed to be due for or on account of the service of "any petty officer, &c. on board, &c. knowing the same to "be false, forged, or counterfeited; then every such person, "being lawfully convicted of any such offence or offences, "shall be deemed guilty of felony without benefit of "clergy."

By statute. Of certificates for seamen's wills; or prize bills, &c.

32 Geo. 3. c. 34. s. 29.

Persons forging petitions for certificates to enable any person to obtain administration, &c. to seamen or marines, or any check, remittance bill, or duplicate of remittance bill, or certificate to the deputy paymaster in order to receive the wages, &c. of such seamen, &c. death.

Petty officers, seamen, &c. attempting to receive their pay on forged certificates, or assisting in forging them, to be punished as in cases of perjury.

By s. 30. "after the 1st of August 1792, if any petty "officer, or seaman, non-commissioned officer of marines, "or marine, shall receive his pay, or shall attempt to receive "the same, or any part thereof, upon any certificate, pur- "porting to be a certificate of servitude, or a certificate of "discharge, knowing the same to be forged or counterfeit- "ed;

" ed; or if any such petty officer by himself, or by employ- Ch. XIX. § 25.
" ing others, shall assist in the forging or counterfeiting of *By statute. Of seamen's and marines' certificates, &c.*
" any such certificate; every such petty officer, or seaman,
" non-commissioned officer of marines, or marine, being
" thereof convicted, shall be punished as in cases of per-
" jury."

By stat. 32 Geo. 3. c. 67. all these regulations are extended to seamen and marines serving on board ships, and residing, in Ireland.

The muster-books of the King's ships documented in the navy office, to which returns are regularly made by the several commanders of the names, &c. of their respective crews, are admitted as evidence of the persons therein named having served on board the several ships in the capacities there mentioned. R. v. Rhodes, O. B. 1742, cor. Reynolds B. 1 Leach, 23. and R. v. Fitzgerald and Lee. ib. 20.

§ 26.

Prefines and postfines.

The stat. 32 Geo. 2. c. 14. directs the receiver of prefines at the alienation office to receive the postfine at the same time on every writ of covenant sued out for the passing of fines in C. B., and to indorse the receipt of the same thereon with his name and the mark of office. And by s. 9. " If any person or persons after the 1st day of Trinity " term 1759 shall make, forge or counterfeit, or cause or " procure to be made, &c. the mark or hand of such receiver " as aforesaid, whereby such receiver, or any other person " or persons shall or may be defrauded or suffer any loss " thereby; every person or persons convicted of such of- " fence shall be deemed guilty of felony without benefit of " clergy." 32 Geo. 2. c. 14.

§ 27.

Franks of letters. 24 Geo. 3. st. 2. c. 37. s. 9. The last act altering the rates of postage 41 G. 3. c. 7. s. 12. incorporates all former general provisions, and this clause is repeated verbatim in the last act 42 G. 3. c. 63. s. 14. relating to the postage.

By stat. 24 Geo. 3. stat. 2. c. 37. s. 9. " If any person " whatsoever shall (after the end of that session) forge or " counterfeit the hand-writing of any person whatsoever in " the superscription of any letter or packet to be sent by the " post, in order to avoid the payment of the duty of post- " age; or shall forge, counterfeit, or alter, or procure to be " forged, &c. the date upon the superscription of any such " letter or packet; or shall write and send by the post, or " cause to be written and sent by the post any letter or " packet the superscription or cover whereof shall be forged " or

Ch. XIX. § 27. *By statute. Of franks of letters.*

" or counterfeited, or the date upon such superscription or " cover altered, in order to avoid the payment of the duty " of postage, knowing the same to be forged, counterfeited " or altered; every person so offending, and being thereof " convicted in due form of law, shall be deemed guilty of " felony, and shall be transported for seven years."

§ 28. *Exchequer bills, &c.* 42 Geo. 3. c. 1. s. 41.

Also the forging or counterfeiting of any Exchequer bill is made a capital felony by the several acts passed usually every year, authorizing the issue of such securities. And by one of the last acts for the issue of Exchequer bills, which may be taken as a modern precedent for the form of the penal clause; " If any person or persons shall forge or coun- " terfeit any Exchequer bill which shall have been made " forth by virtue of the act (42 Geo. 3. c. 1.) before the same " shall have been paid off and cancelled, or any Exchequer " bills to be renewed or made forth in pursuance of the act, " or any indorsement or writing thereupon or therein; or " tender in payment any such forged or counterfeit bill, or " any Exchequer bill with such counterfeit indorsement or " writing thereon; or shall demand to have such counterfeit " bill, or any such Exchequer bill with such counterfeit in- " dorsement or writing thereupon or therein, exchanged for " ready money by any person or persons, body or bodies po- " litic or corporate, who shall be obliged or required to " exchange the same, or by any other person or persons " whatsoever, knowing the bill so tendered in payment or " demanded to be exchanged, or the indorsement or writing " thereupon or therein to be forged or counterfeited, and " with intent to defraud his Majesty, his heirs, &c. or the " persons to be appointed to pay off the same or any of " them, or to pay any interest thereon, or the person or " persons, body or bodies politic or corporate who shall " contract to circulate or exchange the same, or any of " them, or any other person or persons, body or bodies " politic or corporate; then every such person or persons " so offending, being thereof lawfully convicted, shall be " adjudged a felon without benefit of clergy."

Irish debentures, 42 Geo. 3. c. 58.

Also by stat. 42 Geo. 3. c. 58. s. 20. " If any person or per- " sons shall forge or counterfeit, or cause or procure to be " forged,

" forged, &c. or shall willingly act or assist in the forging, Ch. XIX. § 28.
" &c. any receipt or receipts for the whole of or any part *By statute. Of Exchequer bills, debentures, &c.*
" or parts of the said contributions, &c. (towards the loan to
" be raised by that act for the service of Ireland) either with
" or without the name or names of any person or persons
" being inserted therein as the contributor or contributors
" thereto, or payer or payers thereof, or of any part or parts
" thereof; or shall alter any number, figure, or word there-
" in; or utter or publish as true any such false, forged,
" counterfeited, or altered receipt or receipts, with intent
" to defraud the governor and company of the Bank of
" Ireland, or any body politic or corporate, or any person or
" persons whatsoever; or shall forge or counterfeit any de-
" benture or debentures, or alter any number, figure, or
" word therein; or utter or publish as true any such false,
" forged, counterfeited or altered debenture, with intent to
" defraud his Majesty, &c. or any person or persons; every
" such person or persons so forging or counterfeiting, or
" causing or procuring, &c., or willingly acting or assisting
" in the forging, counterfeiting, or altering, uttering or
" publishing as aforesaid, being thereof convicted, shall be
" guilty of felony without benefit of clergy."

By the last Lottery Act, " If any person or persons § 29.
" shall forge or counterfeit, or cause or procure to be *Lottery Tickets, 42 Geo. 3. c. 54 s. 47.*
" forged, &c. or willingly act or assist in the forging, &c.
" any share or shares, or any agreement or agreements for
" any share or shares of any ticket or tickets, divided by
" virtue of this act; or alter any number, figure, word, or
" stamp therein or thereon; or shall knowingly utter, vend,
" barter, or dispose of any such forged, counterfeited, or
" altered share or shares, or agreement or agreements for
" any share or shares of any ticket or tickets, with intent to
" defraud any person or persons; all and every person and
" persons so offending and being duly thereof convicted
" shall be guilty of felony, and suffer as a felon." By former annual acts such offences were made capital.

By s. 42. of the same act, " If any person or persons shall *Forging licenses, &c.*
" forge or counterfeit, or cause to be forged or counterfeit-
" ed, or assist in forging, &c. any license authorized by this
" act; or shall fraudulently alter or cause to be altered, or

Ch. XIX. § 29. *By statute. Of Lottery tickets, &c.*

" assist in altering any such license as shall be really granted " under this act; or shall knowingly make use of any such " forged, counterfeited, or altered license; such person or " persons shall for every such offence forfeit 500*l.* (half to " the Crown and half to the informer) to be recovered by " action, &c. and shall also be subject to imprisonment not " exceeding six months, as the Court in which the offender " shall be convicted shall appoint."

§ 30. *a. Receipts for duties on legacies, &c.* 36 Geo. 3. c. 52.

So the stat. 36 Geo. 3. c. 52. for granting duties on legacies and shares of personal estates, which directs the commissioners of the stamps to receive the same, and to give papers adapted for receipts or discharges to the parties applying upon payment of the duties, and that no legacies liable to the duty shall be paid without such a receipt, containing certain particulars, and the amount of the duty payable thereon, under certain penalties; and that no receipt for any legacy shall be available in evidence unless duly stamped; enacts,

Penalty of 500l. for altering receipts.

Sect. 39. " That if any person shall alter any word, let- " ter, figure, or number, in any assessment or receipt to be " made or given in pursuance of this act, for any of the " said duties, after the same shall have been signed by the " officer appointed to sign the same, according to the di- " rections of this act; or shall utter or publish as true any " such altered assessment or receipt, with intent to defraud " his Majesty, his heirs, &c. or any other person or persons; " then and in such case every person so altering, utter- " ing, or publishing as aforesaid, shall forfeit and pay the " sum of 500*l.*

Persons forging stamps, &c. to suffer death.

Sect. 40. enacts, " That if any person shall counterfeit " or forge, or procure to be counterfeited or forged, any " stamp directed or allowed to be used or provided, made, " or used, in pursuance of this act; or shall counterfeit or " resemble the impression of the same upon any vellum, " parchment, or paper, with intention to defraud his Ma- " jesty, his heirs, &c.; or shall utter, vend, sell, or expose " to sale any vellum, parchment, or paper, liable to the said " duty, with such counterfeit impression thereon, knowing " the same to be counterfeited; or shall privately or fraudu- " lently use any stamp directed or allowed to be used by

" this

" this act, with intent to defraud his Majesty, his heirs, &c. Ch. XLX. § 30.
" of the said duty; every person so offending, and being *By statute. Of Legacy receipts, &c.*
" thereof lawfully convicted, shall be adjudged a felon with-
" out benefit of clergy."

§ 31.

By stat. 39 & 40 Geo. 3. c. 89. s. 25. " The commission- 39 & 40 Geo. 3. c. 89.
" ers of the navy, ordnance, or victualling may sell and *Making or publishing false certificates of naval or military stores.*
" dispose of any of the stores aforesaid, marked as aforesaid,
" (i. e. by s. 1. any stores of war, or naval, ordnance, or *Vide* tit. *Larceny*, s. 53 & 148.
" victualling stores, or any goods whatsoever marked as in
" the stats. 9 & 10 W. 3. c. 41. and 9 Geo. 1. c. 8. are
" expressed, or any canvas marked either with a blue streak
" in the middle, or with a blue streak in a serpentine form,
" or any bewper otherwise buntin wrought with one or
" more streaks of raised tape; the said stores of war, or na-
" val, ordnance, or victualling stores or goods, or any of
" them being in a raw or unconverted state, or being new
" or not more than one third worn;) as they might have
" done before the making of this act; and such person
" or persons as heretofore have or shall hereafter buy
" any such stores, or other stores so marked as aforesaid
" of the said respective commissioners, may keep the
" same without incurring the penalty of this act or any
" other law, upon producing a certificate or certificates
" under the hand and seal of three or more of the said com-
" missioners that they bought such goods or stores from them
" at any time before they sold or delivered the same, or be-
" fore the same were found in their custody, or a certificate
" from such person or persons as shall appear to have bought
" the said stores from the said commissioners, that the stores
" so sold or delivered by them, or so found in their custody,
" were the stores or part of the stores so bought of the said
" commissioners as aforesaid; in which certificate or certifi-
" cates the quantities of such stores shall be expresed, and
" the time when, and where bought of the said commission-
" ers; who, or any three or more of them, and also the
" person or persons afterwards selling the same, are hereby
" empowered to give such certificate to such person or per-
" sons as desire the same, and have bought or shall buy any
" of the said stores, within thirty days after the sale and de-
" livery thereof." Then by s. 26. " If any person or per-
" sons shall make, sign, or give any false certificate, bill of
" parcels,

Ch. XIX. § 31. *By statute. Of certificates of naval or military stores.*

" parcels, or other instrument, purporting the identity or " the sale or disposal of any goods or stores, as goods or " stores so purchased of the said commissioners as aforesaid; " or if any person or persons shall utter or publish any such " false certificate, &c. purporting as aforesaid, knowing the " same to be false; every such offender upon conviction shall " forfeit 200*l.* and be further corporally punished by pillo- " ry, whipping and imprisonment, or by any or either of " the said ways and means, in such manner and for such " space of time as to the judge or justices before whom " such offender shall be convicted shall seem meet. Pro- " vided such judge, &c. may mitigate the said penalty of " 200*l.* as they shall see cause. One moiety of which pe- " nalty shall be to the King, and the other moiety with full " costs to the informer," &c.

Penalty 200l. and corporal punishment.

1 Geo. 1. st. 2. c. 25. *Counterfeiters of the hand of the treasurer, &c. to any bill, ticket, or other paper disposing of naval treasure, to be committed.*

By stat. 1 Geo. 1. st. 2. c. 25. s. 6. " Every person or per- " sons who shall counterfeit the hands of the treasurer, " comptroller, surveyor, clerk of the acts or of the commis- " sioners of the navy, or any of them, or the hand or hands " of the signing or vouching officers of his Majesty's navy, " ships, or yards, or of any one or more of them, to any " bill, ticket, or other papers, by virtue whereof his Majesty's " naval treasure is or may be paid or disposed of; or shall " knowingly produce any such counterfeit ticket, bill or other " paper; every such offender shall and may be lawfully com- " mitted to prison by any of the said officers or commissioners " until he find surety to appear at the next general assizes or " quarter sessions for the county, &c. where such offender " shall be so committed to prison, to be there proceeded " against according to law."

§ 31. *b.* *Land-tax redemption act.* 42 G. 3. c. 116.

By the stat. 42 Geo. 3. c. 116. which consolidates all the acts for the redemption and sale of the land-tax, it is enacted (s. 194.) " That if any person shall forge, counterfeit, or " alter, or cause or procure to be forged, counterfeited, or " altered, or knowingly or wilfully act or assist in the forg- " ing, &c. any contract or contracts, for the redemption or " sale of any land-tax, or any assignment or assignments of " any such land-tax, or of any such contract or contracts, " or of any portion of land-tax therein comprised, or any " certificate or certificates of the commissioners of land-tax " or of supply, or of any chief magistrate authorised by this

" act

" act to make out such certificate or certificates, or of the " surveyor general of the land revenue of the Crown, or of " the dutchy of Cornwall, or any certificate or certificates, " receipt or receipts of the cashier or cashiers of the go- " vernor and company of the Bank of England, or any cer- " tificate or certificates, or attested copy of any certificate " or certificates directed by this act to be made out by the " proper officer; or shall wilfully *deliver* or *produce* to any " person or person acting under the authority of this act, " or shall *utter* any such forged, counterfeited, or altered " contract or contracts, assignment or assignments, certifi- " cate or certificates, receipt or receipts, knowing the same " to be forged, counterfeited, or altered, with intent to de- " fraud his Majesty, his heirs, &c., or any body or bodies " politic or corporate, or company, or other person or per- " sons whomsoever; in every such case, all and every per- " son or persons so offending, and being lawfully convicted " thereof, shall be adjudged guilty of felony without benefit " of clergy."

Ch. XIX. § 31. *b.*

By statute. Of land-tax redemption documents.

6. *Private Papers, Securities, and Documents.*

§ 32.

The stat. 5 Eliz. c. 14. s. 2. enacts, " That if any person or " persons shall of his or their own imagination or by false con- " spiracy or fraud with others, wittingly, subtilly, and falsely " forge or make, or subtilly cause or wittingly assent to be for- " ged or made, any false *deed*, *charter*, or *writing sealed*, *court* " *roll*, or the *will* of any person in writing, to the intent that " the state of freehold or inheritance of any person or persons " of, in, or to any lands, tenements, or hereditaments, freehold " or copyhold, or the right, title, or interest of any person or " persons of, in, or to the same, or any of them, shall or may " be molested, troubled, defeated, recovered, or charged; " or shall *pronounce*, *publish*, *or shew forth in evidence* any " such false and forged deed, charter, writing, court roll, or " will, as true, knowing the same to be false and forged as " aforesaid, to the same intent; and shall be thereof con- " victed either upon action or actions of forger of false " deeds, to be founded upon this statute at the suit of the " party grieved, or otherwise according to law; he shall pay " unto the party grieved his double costs and damages, to " be assessed in that court where such conviction shall be, " and

5 Eliz. c. 14. *Forging deeds, charters, writings sealed, court rolls, or wills, with intent to molest the freehold or inheritance of any.* *Vide* Pult de pace, 45, 6.

Ch. XIX. §32. " and also shall be set upon the pillory in some open market
By statute. Of private securities, &c. by 5 Eliz. c. 14. " town or other open place, and there to have both his
" ears cut off, and also his nostrils to be slit and cut, and
" seared with a hot iron so as they may remain for a perpe-
" tual mark of his falsehood, and shall forfeit to the Queen
" the whole issues and profits of his lands and tenements
" during his life, and also shall suffer perpetual imprison-
" ment during his life," &c.

Or to the prejudice of termors. And by sect. 3. " If any person or persons shall (as aforc-
" said) wittingly, subtilly, and falsely forge or make, or
" wittingly, subtilly, and falsely cause or assent to be made
" and forged any false *charter*, *deed*, or *writing*, to the in-
" tent that any person or persons shall or may have or claim
" *any estate or interest for term of years* of, in, or to any ma-
" nors, lands, tenements or hereditaments, not being copy-
" hold, or any annuity in fee simple, fee tail, or for term
" of life, lives, or years; or shall as aforesaid forge, make,
" or cause or assent to be made or forged any *obligation* or
" *bill obligatory*, or any *acquittance*, *release*, or other discharge
" of any debt, account, action, suit, demand, or other things
" personal; or shall pronounce, publish, or give in evidence
" any such false and forged charter, deed, writing, obliga-
" tion, bill obligatory, acquittance, release, or discharge, as
" true, knowing the same to be false and forged, and shall
" be thereof convicted as aforesaid; then he shall pay the
" party grieved his double costs and damages, to be assessed
" in such court where such conviction shall be had, and
" shall be also set on the pillory in some one market town
" or other open place, and there to have one of his ears cut
" off, and shall also be imprisoned for one year, without
" bail or mainprize."

3 Inst. 172. 1 Hawk. ch. 70. s. 24. Which double damages it appears shall be governed by the penalty, and not by the debt appearing due in the condition.

By s. 5. a Defendant convicted upon this act, who shall have received thereupon punishment corporal according to the act, shall not be impeached again for the same offence.

Second offence felony. By s. 7. " If any person convicted or condemned of any
" of the offences aforesaid by any of the ways above limited
" shall after any such conviction or condemnation eftsoons
" commit

" commit any of the said offences in form aforesaid, every " such second offence or offences shall be adjudged felony, " and the parties being convicted or attainted thereof shall " suffer such pains of death, and forfeiture, &c. as in cases " of felony, without benefit of clergy." But by s. 8. this shall not take away dower or corrupt the blood. Ch. XIX. § 32. *By statute. Of private securities, &c. by* 5 Eliz. c. 14.

The 7th sect. includes one who, having being convicted for forging a deed, afterwards knowingly publishes the forged deed of another. 3 Inst. 172.

There must be a *conviction by judgment* of a first offence *before* the second offence be *committed;* otherwise it is not felony: the record of which conviction must be set out in the indictment for the second offence, in order that it may appear to be a conviction of such a forgery as is within the statute; but a prior conviction of any offence within the statute is sufficient. 1 Hale, 686. 1 Hawk. ch. 70. s. 25. 3 Inst. 172.

Sect. 10. gives power to justices of oyer and terminer and of assize to hear and determine the offences. Under this the Judges of B. R. have jurisdiction, but not justices of the peace in Sessions. 1 Hale, 687. Cro. Eliz. 87.

Sect. 11. repeals all former statutes provided for forgery of false deeds, charters, muniments, or writings.

Sect. 15. provides that the act shall not extend " to any " attorney, lawyer, or councellor, who shall for his client " plead, shew forth, or give in evidence any false and forged " deed, charter, will, court roll, or other writing for true, " being not party or privy to the forging of the same, &c.; " nor (by s. 16.) to any person who shall plead or shew forth " any deed or writing exemplified under the great seal, or " under the seal of any other authentic court of this realm, " nor to any Judge or other person who shall cause any seal " of any court to be set to any such deed, charter, or writing " enrolled, not knowing the same to be false or forged." By s. 12. there is a similar exception in favour of proctors, &c. in the ecclesiastical courts. *Exception as to attornies, &c.*

§ 33.

The above statute of Elizabeth has now nearly fallen into disuse since the passing of the stat. 2 Geo. 2. c. 25. which extends to all deeds and wills, upon which the prosecution is easier and the punishment capital in the first instance. There are besides several particular statutes, before noticed, *Construction on* 5 Eliz. c. 14. *Vide* Crooke's case, post. 921.

Ch. XIX. §33. *By statute. Of private securities, &c. by 5 Eliz. c. 14.*

ticed, adapted and confined to the forgery of the like instruments in the names of particular persons or corporations. And it may be remarked once for all, that the same general rules of construction will apply equally to the same instruments named in the several statutes passed in pari materiâ, and all must necessarily be governed by the same principles of the common law.

3 Inst. 170, 2. 1 Hawk. ch. 70. s. 18. 1 Hale, 684. Noy. 42. 3 Bac. Abr. 280, &c.

The first branch of the statute is confined to forgeries affecting the estate in possession, or the right, title, or interest of any person in or to the freehold or inheritance of the lands, &c.; as the ensuing branch is to be understood when the forgery is to the molestation of a termor. But a forgery of a rent-charge or even of a lease for years in the name of one who is seised of the freehold or inheritance is within the former part; and the words *for a term of years* in the second branch relate to such an estate or interest in esse before.

1 Hawk. ch. 70. s. 17. 22. 3 Inst. 169. 1 Hale, 684. Tavemer's case, Dy. 322. 15 H. 7. 16.

The words "*writing sealed*" have been holden to extend to a false customary of a copyhold manor, under the seals of several of the tenants, containing false customs to the disherison of the lord, and purporting to be by the consent of all the tenants and the allowance of the lord: and so a statute merchant or recognisance in nature of a statute staple is within the statute, as having the seal of the party; though it is doubted in Rolle whether a statute staple be so, because it need only have the seal of the staple.

2 Roll. Abr. 466. (F), pl. 2, 3. 5. Ib. pl. 4. et vi. 3 Inst. 171.

3 Inst. 169, 170, 1. 1 Hawk. ch. 70. s. 19. 26. Marriott's case, 2 Show. 5.

By the first clause the deed, charter, or writing must be sealed, and so it must appear in the indictment; but the court roll or will need not be sealed. And this holds good also in the construction of the second branch, where the word *writing* extends to a will whereby a term for years is devised; as the word *will* in the first branch means a will concerning the freehold and inheritance. But I cannot reconcile with the words of the statute what is said by Lord Coke and Lord Hale, that a will in writing concerning goods only is within the second branch; and the passage in Dyer referred to by Lord Coke does not support the position.

3 Inst. 171. 1 Hale, 685. Dy. 302. b.

3 Inst. 171. 1 Hawk. ch. 70. s. 21, 22. 3 Leon. 170.

The words "any obligation or bill obligatory" in the same clause must be intended of such as are sealed. But the forgery of a deed containing a mere gift of personal chattels is not within it.

The

The forgery of a lease of lands in Ireland is said not to be within this statute, but punishable as a misdemeanor at common law (*a*).

The case of Crooke may be referred to as a good explanation of the statute. That was an indictment on the stat. 5 Eliz. c. 14. for forgery, wherein Garbut and his wife were said to be seised of certain messuages lands and tenements called *Jawick*, (containing in fact 300 acres), and the conveyance forged by the Defendant was of Jawick *Park*, containing 4000 acres, which was charged to be done with intention to cheat Garbut and his wife. After conviction and a motion for a new trial, which was denied, it was moved in arrest of judgment, and the case was argued at great length, and was under consideration for several terms. The Court took time to consider of their judgment; and finally the Chief Justice delivered their opinion, that the act of parliament did not mean that there should be a forged conveyance of the very lands; but if it were any deed whereby the party might be molested it was sufficient. That in this case the variation was only as to the description of the lands; and if such a variation were to get the offender off, it would defeat the statute. That it was not necessary that the land should be really affected by the forged deed, or that the party should be evicted; but if he might be disturbed by it, it was within the intent of the act of parliament. That in this case it was proved that after the deed was forged the Defendant sent word that he had purchased Jawick, and that he had actually taken out writs against the tenants of Jawick in order to eject them.

R. v. Crooke, B. R. E. 4 G. 2. Masterman's Notes, S. C. 2 Str. 901. and more fully in Fitzg. 57. and 261. *On an indictment for forgery within the stat.* 5 Eliz. *it is sufficient if the party may be molested in his possession, though he be not evicted: and a variance of Jawick Park for Jawick in the forged deed is not material. Vide* the precedent of this indictment at large in Crown Circ. Comp. tit. *Forgery*, 112. (edit. 1738).

Sir J. Strange's report in somewhat stronger terms states that the Court relied on the words of the act, "*to the intent* "that the state of freehold, &c. of any person to any lands, "&c. or the right or title of, in, and to the same, shall or "may be molested, troubled, defeated, recovered or "charged:" By which it appeared that it was not necessary that there should be a charge, or *a possibility of a charge;* it was sufficient if it were done *with that intent;* and the jury had found that it was done with intent to molest Garbut and his wife in the possession of their lands.

2 Str. 902. *Vi.* post. what was said by Lee J. on the prior day.

The Defendant received judgment as directed by the statute, viz. to be set in the pillory at Charing Cross, to have

(*a*) 1 Hawk. ch. 70. s. 20. 1 Hale, 684. 3 Leon. 170.

Ch. XIX. § 33. *By statute. Of private securities, &c. by* 5 Eliz. c. 14.

both his ears cut off, his nostril slit and seared with a hot iron, his rents forfeited to the king for life, and to be imprisoned during life.

MS. ante,

In the course of the discussion all the Judges delivered their opinions, and agreed that the intent of the party to molest &c. the estate was a matter of fact proper to be left to the jury upon the evidence, and that the *quo modo* which was evidence of such intention need not be stated in the indictment. The principal question seemed to be, whether it were necessary to bring the case within the statute that the deed, supposing it to be genuine, should be such as might possibly have an effect; which Ld. C. J. Raymond seemed to think this deed could not have by reason of the variance; it not being laid in the indictment that Garbut was seised of Jawick Park, or that *Jawick Park* was part of *Jawick*, or that the lands were known as well by the one name as the other, or any other matter whereby to ascertain them to be the same, [and there being no averment of any previous treaty concerning Jawick in consequence whereof there was a conveyance of Jawick Park, which (if it had been a real transaction) would, he thought, have laid a foundation for a court of equity to decree a conveyance of Jawick: so that, he observed, the objection in all its force was reduced to this, that upon the face of the indictment no title could be made either in law or equity to the lands of Jawick.] Page J. observed, that the statute did not require that the deed should be for the conveyance of lands or any thing else in the possession of the party: but it might be any deed by which the party might be disturbed, and the intent was a matter of fact proper to be left to the jury. No ejectment would lie in this case; nor even if the conveyance had been of *Jawick* could it have had any effect, being a forged deed, which was no deed at all. But he seemed to think that if the deed had been really executed by Garbut and his wife, with that mistake, a court of equity would have obliged them to execute a proper deed. And if they would have been liable in case of a true deed, they might be said to be liable to be disturbed under colour of a false one till it was discovered to be such. Probyn J. also thought that the estate would have been bound in equity if it had been a true deed with such a mistake in it. Lee J. said, that all that was necessary was to charge such facts in the

The words within the crotchets are taken from Fitzgibbon's Report. The rest is taken in substance from Masterman's MS. Notes.

By statute. Of private securities, &c. by 5 Eliz. c. 14.

the indictment as constituted the offence created by the statute; and it was not necessary to lay those facts which were evidence of the intention, because that was proper for the jury, and they had found the intention. And though the deed as it was set out might not have any operation in law, yet the intention of the Defendant might be as much to molest the possession of Garbut as if the deed had been good.

§ 34.

Forging deeds, wills, bonds, bills, notes, acquittances or receipts for money or goods—capital by 2 G. 2. c. 25. 9 G. 2. c. 18. 31 G. 2. c. 22. s. 78.

By stat. 2 Geo. 2. c. 25. made perpetual by stat. 9 Geo. 2. c. 18. "if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, &c. or willingly act or assist in the false making, &c. any *deed, will, testament, bond, writing obligatory, bill of exchange, promissory note* for payment of money, *indorsement* or *assignment* of any bill of exchange or promissory note for payment of money, or any *acquittance* or *receipt* either for money or goods, with intent to defraud any person whatsoever, [and by stat. 31 Geo. 2. c. 22. s. 78. with intent to defraud any corporation whatsoever]; or shall *utter or publish* as true any false, forged or counterfeited deed, &c. with intent to defraud any person (or corporation), knowing the same to be false, forged or counterfeited; every such person being thereof lawfully convicted shall be deemed guilty of felony without benefit of clergy."

Extending to acceptances, accountable receipts, orders for payment of money, or delivery of goods.

7 Geo. 2. c. 22.

18 Geo. 3. c. 18.

The stat. 7 Geo. 2. c. 22. (made to supply the defects of the former act which it recites, and reciting further that no punishment is inflicted by the said act on such as commit the offences thereinafter set forth,) enacts, that "if any person shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, &c.; or willingly act or assist in the false making, &c. any *acceptance of any bill of exchange*, or the *number* or *principal sum* of any *accountable receipt for any note, bill, or other security for payment of money*, or any *warrant or order* for *payment of money, or delivery of goods;* with intent to defraud any person whatsoever, [and by stat. 18 Geo. 3. c. 18. with intent to defraud any corporation;] or shall utter or publish as true any false, altered, forged or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill, or other security for payment of money, or warrant or order for payment of money, or delivery of goods, with intention

Ch. XIX. § 34. *By stat* 2 Geo. 2. c. 25, &c. *Of deeds, wills, notes, receipts, &c.*

"tion to defraud any person (or corporation), knowing the "same to be false, altered, forged or counterfeited; then "every such person being thereof lawfully convicted shall "be deemed guilty of felony without benefit of clergy (*a*)."

In the statute of 7 Geo. 2. there is no express saving of corruption of blood as in the others: and by s. 4. of the stat. 2 Geo. 2. c. 25. the act is not to extend to Scotland.

§ 35. *Writing obligatory.*

I now proceed to note such determinations as have ascertained what sort of instruments come within the descriptions in the above mentioned statutes.

(*a*) Many of the cases upon these statutes have turned more upon the general principles of forgery than on the particular construction of the words of the statutes themselves. These therefore may be more conveniently distributed under the general heads of inquiry. Thus under the 4th head, concerning the validity in law of the thing forged, are noticed the case of Japhet Crooke, for forging a lease and release; Coogan's case in 1787; Murphy's case in 1753; and Stirling's case in 1773, for forging wills in the names of living persons; Fitzgerald and Lee's case in 1741, for forging the will of a deceased seaman, with a variance in the name in different parts of it. So cases of forging Bank notes, &c. where the question has turned on the degree of similarity to the true one, as Jones's case and others. So Reading's case in 1793, for forging an acceptance in a different name from that of the person to whom the bill of exchange was directed; Moffatt's case in 1787, for forging a bill of exchange for a less sum than 5*l.* which is disallowed by stat. 17 Geo. 3. c. 30.; Wall's case in 1800, for forging a will of land attested only by two witnesses; and Hawkeswood's case in 1783, and others since, for forgery of bills of exchange which appeared without stamps.

Under the 5th head of inquiry, how far using a fictitious name or personating the true man, &c. will affect the offence. Lewis's case 1754, for forging a power of attorney; and Wilks's case in 1767, for forging a bill of exchange; Aickles's case, for forging a promissory note; Bolland's case, for forging an indorsement on a promissory note; Taft's case in 1777, for the like; Lockett's case in 1772, and Shepherd's case in 1781, for forging orders for payment of money; and *Taylor's* case in 1779, for forging a receipt for money; all forgeries in the names of fictitious persons, whose characters were in some instances assumed by the prisoners; and Dunn's case 1769, for forging a promissory note; and the case of Mead v. Young, for forging an indorsement of a bill of exchange; both in the names of real persons; and many others of the like sort will be found.

Under the 8th head of inquiry, as to the indictment and evidence, Mason's case, for uttering a forged acceptance of a bill the tenor of which was not set forth, and others of that sort; Testick's case in 1774, and Hunter's case in 1794, for forging a receipt for money; Reading's case in 1793, for forging a bill of exchange; Gilchrist's case in 1795, for forging an order for payment of money; Jones and Palmer's case in 1785, for forging a deed and a receipt for money; Dunnett's case in 1792, for forging a bond and writing obligatory; and various other cases, where the questions have either turned on the manner of charging the offence, or the application of the evidence to the charge.

Writing-

Writing-Obligatory.

In Dick's case, who was indicted and convicted of knowingly uttering a forged writing-obligatory commonly called a Scotch bank note in this form;

Ch. XIX. § 35. *By stat.* 2 Geo. 2. c. 25, &c. *Of deeds, wills, notes, receipts, &c.*

" Five Pounds Bond accord. Sterling.
" No. 157.

28 " Aberdeen, 1 May 1767.

" The Banking Company in Aberdeen are hereby obliged
" to pay Js. Brand or bearer on demand at their office
" here, five Pounds sterling, by order of the Directors.
" W. Brebner, } Directors. R. Sunderland,
" J. Burnett, } Cashier."

Dick's case, Newcastle, 1770. MS. Gould J. 1 Leach, 79. S.C. Qu. *Whether uttering in England a promissory note of a Scotch Bank payable in Scotland be within the stat.* 2 G. 2. c. 25.

the Judges were divided in opinion whether such a note were within the maning of the stat. 2 Geo. 2. c. 25.; and whether the uttering it in England were felony; the statute (s. 4.) having negatively excluded Scotland; and the note being made payable locally where it was drawn. At length the prisoner received the King's pardon.

Receipt for Money. § 36.

William Testick was found guilty on the second count of an indictment, which charged that he feloniously uttered and published as true a certain false, forged, and counterfeited *receipt for money*, with the name " Stephen Withers of, &c. " for the sum of 1*l.* and 4*s.*, which last-mentioned false, " &c. receipt, is as follows," viz.

Testick's case, Bodmin Sum. Ass. 1774, MS. Gould J. *Indictment for publishing a forged receipt for money in the terms of the receipt itself,* " *Received the* " *contents above,* " *by me, &c.*" *without setting forth the bill of items to which it referred, is sufficient; for that is matter of evidence.* *Vide post.* s. 53.

" 18th March 1773.
" Received the Contents above by me,
" Stephen Withers."

with intent to defraud R. Goadby, he the Defendant at the said time when, &c. well knowing the said receipt to be forged, &c.

It appeared in evidence that Goadby sold Lottery tickets and shares, and paid the money for prizes; and that the prisoner was employed by him to carry out the prize money with an account of the deductions to pay it to the party, and bring back his receipt. On the 16th of March 1773 the prisoner had the following account delivered to him with money to pay the balance.

No.

Ch. XIX. § 36. *By stat.* 2 G. 2. c. 25, &c. *Of deeds, &c. and receipts.*

No. 38,811.

Mr. Withers.	£.	s.	d.
One 16th of a £. 20 Prize - - -	1	5	0
Deduct for expences advancing and remitting money to you - - - - -	0	1	0
	1	4	0

which account the prisoner on settling his accounts produced to Goadby, with the receipt stated in the indictment at the bottom of the said account, and took credit for the amount, knowing that Withers had not been paid; and having made excuses to him for the omission. It was proved by Withers who had before the trial been paid the money by Goadby, that the receipt was not his hand-writing.

It was objected by the prisoner's counsel, that this receipt did not correspond with the indictment; for nothing was set forth but the receipt as for *the contents above:* and that together with the bill of particulars was one entire thing; and it being set forth, "which said false receipt, &c. is as follows," the whole ought to have been set forth, and not part only. namely, "*the contents above;*" which did not appear to be the same, nor to be a receipt for money. And this objection was likewise urged after conviction in arrest of judgment as to the insufficiency and inconsistency of the indictment; in this, that it did not appear by the receipt set out in the indictment that it was a receipt *for money*, or what it was for; and being only for *the contents above*, and nothing set forth to shew what they were, or explain the receipt, it was unintelligible. After conviction judgment was respited: but in Michaelmas term 1774 the Judges were of opinion that the indictment was sufficient; for it was "*Received* "*the contents above*," which shewed it to be a receipt for something though the particulars were not expressed; and it was laid to be a forged *receipt for money* under the hand of S. W. for £.1 4 0; and the bill itself was only evidence of the fact, and shewed it to be a receipt *for money* as charged.

(Absent De Grey C. J. and Perrott B.; and by Serjt. Foster's MS. Eyre B. doubting.)

Vide Taylor's case, post.

Harrison's case, O. B. Sept. 1777, cor. Blackstone J. MS. Buller J. (1 Leach, 215. S. C.)

John Harrison was accomptant to the London Assurance Company, who kept their cash with the Bank of England. For which purpose the Bank furnished the company with a book, the title of which was, "Debtor, the Bank of Eng-
"land,

"land, with the London Assurance, creditor." When any money or bank note was paid into the Bank, the clerk of the Bank entered the amount on the debtor side, to which he signed his name. And on the other hand, when the company drew for money, the cashier of the Bank *wrote off* so much from their bank book. This bank book was kept by the prisoner, as accomptant to the company, and sent by him to the Bank as occasion required. And one John Clifford the Bank clerk having entered on the debtor side of the account book "1777. June 16. Bank notes. C. £.210." as so much received for the use of the Assurance Company, the prisoner prefixed the figure 3 to the sum, thereby, making the sum received to be £.3210. The prisoner was indicted for this forgery, and the indictment contained different sets of counts, the one set framed on the stats. 2 Geo. 2. c. 25. and 31 Geo. 2. c. 22. s. 78. charging the prisoner with forging and uttering a certain *receipt for money*, viz. "1777. "June 16. Bank notes. C. £.3210.", with intent respectively to defraud the Bank of England, and the London Assurance Company. The other set framed on the stat. 7 Geo. 2. c. 22. charging the prisoner with altering and uttering a certain *accountable receipt for bank notes for payment of money* (setting it out as before) viz. the said sum of £.210, by prefixing the figure 3 to the said figures and cypher £.210, whereby the words, &c. "1777. June 16. Bank "notes. C. £.210," together with the figure 3 imported that J. C. a clerk of the Bank of England had received bank notes to the amount of £.3210, with the like intent.

A forged receipt for Bank notes *is not a receipt for* money *or* goods *within the stat.* 2 Geo. 2. c. 25. *nor is such forgery with intent to defraud a* corporation *within the stat.* 7 Geo. 2. c. 22. *though now it is within the stat.* 18 Geo. 3. c. 18.

It was first objected that the case was not within the first set of counts, which were framed on the stats. 2 & 31 Geo. 2. those statutes being confined to receipts for *money* or *goods*, and this being a receipt for *bank notes*, which were neither money nor goods; and that the Legislature had so thought by passing the stat. 7 Geo. 2. in which *bills*, *notes*, &c. are particularly mentioned. And the Court allowed this objection. It was next objected as to the other set of counts, that the stat. 7 Geo. 2. on which they were framed (though otherwise including such a receipt) was confined to offences of this description done with intent to defraud any *person;* whereas this was laid with intent to defraud the two corporations

Ch. XIX. § 38. *By stat.* 2 Geo. 2. c. 25, *&c. Of deeds, &c. and receipts.*

tions respectively named. That the legislature had decided the validity of the objection by passing the stat. 31 Geo. 2. c. 22. which reciting that doubts had arisen whether the word *person* extended to a corporation, re-enacts the provisions of the stat. 2 Geo. 2. c. 25. as applicable to corporations, but omitted to include the offences named in the stat. 7 Geo. 2. This point was reserved for the opinion of the Judges, and the prisoner was acquitted on the first set of counts and convicted on the second set. But the Judges afterwards decided this objection also in favour of the prisoner, and he was discharged. The defect however is now supplied by the stat. 18 Geo. 3. c. 18. before set forth.

Ante, 923.

1 Leach, 218. *Forging a receipt for Bank notes in these words, "1777, June "16, Bank notes "C. 3210l." is an accountable receipt within the stat.* 7 Geo. 2. *being written in a book kept for the purpose of entering receipts of money for the use of the parties.*

In the printed report of this case it is also said that the Judges were clearly of opinion that the entry in the bank book as set forth was an *accountable receipt* within the meaning of the act, though no opinion was publicly given. The ground of this opinion was afterwards alluded to by Grose J. in Lyon's case after mentioned (*a*). It does not appear whether this opinion were formed with reference to the manner in which the offence was laid in the indictment, which no otherwise connected the entry itself forged with the book in which it was made than by averring that the Defendant forged, &c. "a certain receipt for money, purporting to be a receipt "given on the 16th of June 1777 by one J. C. (which said "J. C. then, &c. was and still is a clerk of the governor "and company of the Bank of England, entrusted and employed by the said governor, &c. to give receipts on their "behalf for such sums of money, notes, &c. as he might "receive for the said governor, &c.) for and on behalf of "the said governor, &c. to a certain corporation called "*The London Assurance*, for the said governor," &c. (Then after setting forth the tenor of the receipt as before mentioned) "which said receipt for money, &c. did import, signify and express that the said J. C. as Clerk of the said governor, &c. had on the 16th of June 1777 received of the said corporation called The London Assurance the sum of £.3210, with intent to defraud," &c.

Vide the Precedent at large in the *Crown Circuit Assistant*, 280. and *vide* Hunter's case, post.

(*a*) P. 938.

Hunter's case, O. B. Dec. 1794, cor. Perryn B. MS. Jud. (2 Leach, 711. S. C.)

William Hunter was tried on an indictment charging, that he had in his possession a paper partly printed and partly written, called a navy bill, signed by Sir A. Hammond, Bart. (and others) three of the principal officers and commissioners of

of his Majesty's navy; which said paper is to the tenor and effect following, that is to say, "Extra. Received the "20th Sept. 1799. No. 660. To Edward Wilson, pilot "extra, in reward for his service, between the 1st June and "the 8th Sept. 1794, in piloting his Majesty's sloop Lord "Mulgrave from the river Humber to the Downs, thence "to Spithead, and back to the river Humber, and attend-"ance, as appears by a certificate remaining in the comp-"troller's office, the sum of £.25.

A. S. Hammond. S. Henslow. Geo. Marsh."

And under which said paper partly printed, &c. called a navy bill, was then and there contained a certain order in writing for payment, called an assignment, for payment of the sum of money mentioned in the said paper, &c. called a navy bill, bearing date 24th Sept. 1794, and signed by G. Marsh, Esq. Geo. Rogers, Esq. and Samuel Marshall, Esq. three of the said principal officers and commissioners of his Majesty's navy; and which said order in writing for payment, called an assignment, for payment of the said sum of money mentioned in the said paper partly printed, &c. called a navy bill, is to the tenor and effect following, that is to say, "No. 6460. to be paid out of £.2000 received 8th "Sept. 1794, and appointed to pay pilotage on the head of "wages.

"G. Marsh. G. Rogers. S. Marshall.

"Assigned the 24th Sept. 94.

O. S."

Upon which said paper writing was then and there contained a certain indorsement partly printed and partly written by one Wm. Davis, chief clerk to the comptroller of his Majesty's navy in his office for bills and accounts, which said indorsement is to the tenor and effect following, that is to say, "The certificate within mentioned is indorsed by "Ed. Wilson payable to Mr. Wm. Thornton.

"T. Davis."

The indictment then charged that the prisoner did feloniously forge, &c. a certain receipt for money, to wit, for the sum of 25*l.* mentioned and contained in the said paper partly written, &c. called a navy bill; which forged receipt is as follows, that is to say, "Wm. Thornton." "Wm.

Ch. XIX. § 36.

By stat. 2 G. 2. c. 25, *&c. Of deeds, &c. and receipts.*

It is not sufficient in an indictment for forging a receipt to an assignment for payment of a certain sum in a navy bill to state such navy bill and such assignment, and then charge that the prisoner forged a receipt for money mentioned in the said navy bill as follows; viz. "*Wm. Thornton,* "*Wm. Hunter;*" *because the mere signing such names, unless connected with the previous matter, does not necessarily purport on the face of it to be* a receipt: *but it should be averred that such navy bill, &c. together with such signature, did purport to be and was a receipt, &c. and that the prisoner did feloniously forge the same.*

Ch. XIX. § 36. *By stat.* 2 G. 2. c. 25, *&c. Of deeds, &c. and receipts.*

" Hunter," with intention to defraud his Majesty, against the statute, &c.

A second count stated the navy bill, the order for payment, and indorsement, in the same manner as in the first count; and then stated that to the said last-mentioned paper partly written, &c. called a navy bill, was annexed and written a certain false, forged, and counterfeited receipt for money, to wit, for the sum of 25*l.* in the said last-mentioned paper partly printed, &c. called a navy bill; which said false, forged, and counterfeited receipt for money is as follows; that is to say, " Wm. Thornton." " Wm. Hunter." And that the prisoner did utter and publish as true the said last-mentioned forged and counterfeited receipt for money, with intent to defraud his said Majesty; he well knowing the same to be false, &c. There were other similar counts, some charging the instrument forged to be an *acquittance;* others stating the intention to be to defraud Wm. Thornton and other persons.

On the trial it appeared that Edward Wilson, who had been pilot of the Lord Mulgrave, having received from his captain a certificate of his service, sent it to Wm. Thornton to receive his wages. That the prisoner was a clerk in the comptroller's office; and being employed to forward the pilot's bills through the office, got into his hands the bill stated in the indictment, and carried it with the order for payment and indorsement upon it, which were necessary for receiving the money, to the cashier of the pay-office; having wafered to one side of the bill, on which was written the sum 25*l.*, under those figures, a four-penny stamp used for receipts, on which were written the names of " Wm. Thornton, Wm. Hunter," without any words importing that they had received the money. And it was proved that the cashier was in the habit of paying navy bills on the owner's name being written under the sum without any other receipt. It appeared on producing the bill that the name Major Woolhead was written at the bottom of it; with respect to which it was proved that it was usual to have his name to the bills, as without it they did not regularly pass through the office; but that a bill would not be stopped if his name were not put to it. There also appeared on one side of the bill the initials

initials of Mr. Davis's name, T. D. which were not stated in the indictment. Ch. XIX. § 36. *By stat.* 2 G. 2. c. 25, &c. *Of deeds, &c. and receipts.*

After conviction, judgment was respited to take the opinion of the Judges on the case, which was argued before all the Judges (except Ashhurst J.) in the Exchequer-chamber, where several objections were made on behalf of the prisoner to the indictment. 1. Because it did not appear by the tenor of the instrument as set forth in the indictment that it was a receipt. 2. Because there was nothing stated in the indictment to shew that this could operate as an acquittance. It was argued as to the first, that forgery consisted in making a false instrument so as to resemble a genuine one. That it was not sufficient, as here, to allege generally that the prisoner forged a receipt, which was a conclusion of law, but facts must be stated to shew the Court that such conclusion was true. Wherefore the indictment must set out the instrument itself forged, that the Court might see that it was such as the statute intended which made the forging of it felony. That here the tenor of the instrument set forth was simply "Wm. Thornton, Wm. Hunter," which did not import a receipt, and was stated as an independent instrument; the previous statements of the navy bill, &c. having no connection with the charge, and being only stated as inducement. For though the second count stated that the receipt was *annexed* to the navy bill, yet that only implied that originally the instrument considered as the receipt was something independent in itself; and it only amounted to charging that that which was no receipt in law was so annexed. That this therefore was not like the case of an indorsement of a bill of exchange, which was always connected with and incorporated into the bill itself. 2. That supposing the meaning of the instrument need not necessarily appear on the face of it, still this indictment was bad, inasmuch as there was nothing which charged that the words in question meant or purported (*a*) to be the receipt of any one, which was necessary where the instrument did not shew its meaning upon the face of it. 3. It was objected, that as 16th June 1795.

(*a*) It was asked by Eyre C. J. Whether there were any authority to shew that the meaning of equivocal words could be fixed by alleging that they *purported* to be such or such a thing? for he conceived that the word *purport* signified *apparent* meaning.

the

Ch. XIX. § 36. *By stat.* 2 G. 2. c. 25, &c. *Of deeds, &c. and receipts.*

the navy bill set forth in the indictment had not the letters "T. D." nor the name "Major Woolhead," it varied from the navy bill proved.

It was answered on the part of the Crown to the two first objections, that it was sufficient to set out the tenor of the thing forged, which here consisted of the name, and was averred to be a receipt for money; and the only question was, whether a receipt could not consist of a name, which no doubt it might, if in point of fact it were so intended. Then the indictment stated the existence of the navy bill, and that to obtain payment of it the prisoner forged the name "Wm. Thornton" as a receipt, the meaning of which was properly to be ascertained by evidence, and needed not to be stated on the record. 3. That the omissions adverted to in setting out the navy bill constituted no part of it, but were merely signatures or memoranda made by the clerks through whose offices the bill passed; and that they furnished no ground of objection in this case, as the navy bill was merely set out in the indictment by way of inducement.

In Easter term 1796 judgment was arrested on the ground, that it did not appear on the face of the indictment, nor was it shewn by averment, that the instrument was a receipt. Though Buller J. thought that the second count might be supported; considering this to be as much a receipt as the writing a name was an indorsement on a bill of exchange. But to this it was answered, that an indorsement was complete by writing the name on the bill without any thing more. Whereas the name itself as stated in the indictment was no receipt; though the name coupled with the navy bill might together form a receipt. But then it ought to be so stated; as was done in a case referred to in the Crown Circuit Companion, (p. 405 ed. of 1799.) which was an indictment for uttering a forged warrant for payment of a South-Sea annuity, wherein it was stated that one D. H. was a clerk of the S. S. Company entrusted to sign warrants for the payment of money; and that one H. P. having in his custody a certain warrant, &c. signed by the said D. H. and directed to R. R. the cashier of the Company for the payment of 8*l.* to one W. D., on the back of which said warrant the said W. D. had signed his name; *which said paper partly printed, &c. together with the said indorsement in form aforesaid, did purport*

port to be and was a receipt, acquittance, and discharge, under the hand of the said W. D. for the said sum of 8*l.*, he the said H. P. did feloniously alter, &c. (*a*).

James Lyon was indicted for forging a scrip receipt for 2000*l.* 3 per cent. cons., which was charged to be *a receipt for money*, in this form:

" £.2000 three per cent. annuities 1793.

" By virtue of a resolution of the House of Commons for " raising £.4,500,000 for the service of the year 1793.

" Received of the sum of £.144 for " the deposit of £.10 per cent. on £.1440, sub- " scribed by him in pursuance of the abovesaid " resolution; and upon due payment of the remain- " ing £.90 per cent. of the said sum of £.1440, " the said subscriber or his assigns by indorsement " hereon will in exchange for this *receipt* become " entitled to £.2000 joint stock of 3 per cent. an- " nuities, which were consolidated at the Bank of " England by certain acts, &c., the interest to com- " mence from the 5th January 1793, &c. Witness " my hand this 4th April 1793.

" Entered. W. Johnson. T. Thompson."

" 31st May.

" Received £.144 for second payment.

" Entered. W. Smart. T. Thompson."

(Setting forth like receipts for other payments to the fifth inclusive;) With intent to defraud the governor and company of the Bank of England.

Lyon's case, O. B Dec. 1793, 2 Leach, 681. *A scrip receipt with the blank for the name not filled up with the name of the subscriber, and therefore not purporting to be a receipt of the sum therein mentioned from any person, is not a* receipt for money *within the statutes.*

There were other counts laying the intent to be to defraud other parties, and for uttering the same (*b*). To this there was a demurrer on the ground that the instrument forged was not *a receipt* for money within the statutes, inasmuch as it was not filled up with the name of the subscriber or person from whom the money was received. And after argument by counsel, and consideration of the case by all the Judges to whom it was referred, they were all of opinion that the prisoner was entitled to judgment. Grose J. in delivering the opinion of the Judges observed, that the instru-

(*a*) *Vide* 2 Leach, 719. where the opinion of the Judges as delivered by Mr. Justice Grose at the O.B. in May 1796 is stated.

(*b*) Another indictment charged a similar offence as a forgery of a *scrip* receipt; to which there was also a demurrer.

ment,

Ch. XIX. § 36. *By stat.* 2 G. 2. c. 25, *&c. Of deeds, &c. and receipts.*

ment, the tenor of which was necessarily set forth in the indictment, was not *a receipt* for money in contemplation of law, within the meaning of the statute 2 Geo. 2. c. 25, &c. That it was the duty of the cashier, appointed by the Bank to receive such subscriptions, to fill up the receipts with the names of the subscribers or persons from whom they originally received the money; and until the blank left in the printed form were so filled up, the instrument did not become an acknowledgment of payment, or in other words a *receipt* for money. While in such a state it was no more a receipt than if the sum professed to be received were omitted.

Ante, 928.

That in Rex v. Harrison, the book in which the entry was made imported to be a book containing receipts for money received by the Bank from their customers, and therefore shewed that the money was received from the party to whom the book belonged.

Thomas's case, O.B. Sept. 1800, cor. Le Blanc J. MS. Jud.

On an indictment on the stat. 2 G. 2. c. 25. *for uttering forged receipts or acquittances for money, proof that the Defendant (who was the representative of one* C. *deceased, who had contracted with the Navy board,) produced forged receipts or vouchers, as if from the persons employed by* C., *to supply the articles wanted, with intent to induce the board to pass* C.'s *accounts, is an offence within the statute; though the persons whose receipts were so forged were only accountable to* C., *and not to the Navy board.*

George Thomas was indicted for forging, and for uttering knowing to be forged, a variety of acquittances and receipts for money. The first count charged that the prisoner on, &c. feloniously did utter and publish as true a certain false, forged, and counterfeited *acquittance and receipt for money*, (to wit) for 3*l.* 12*s.*, in the words, &c. following, (viz.) "Received the 8th of May 1794 of John Collinridge the "sum of three pounds twelve shillings for wheelwright's "work for the honourable commissioners of his Majesty's "navy.

"£.3 : 12. William Clarke."

Also a certain other false, forged and counterfeited acquittance and receipt for money, to wit, for 1*l.* 5*s.*, in the words, &c. following; (and so stated in like manner 22 other receipts of different dates, for different sums, purporting to be signed by different persons, as received of the said John Collinridge;) with intent to defraud our Lord the King; he the Defendant at the time of uttering, &c. well knowing the same to be false, forged, and counterfeited, against the statute, &c. There was a second count for uttering, &c. one acquittance and receipt only (setting it out) with the like intent; and a third count for forging and counterfeiting the same acquittance and receipt (setting it out) with the like intent, against the statute, &c.

Before

Before the case was opened on the part of the prosecution, the prisoner's counsel applied to the Court that the prosecutor might be put to elect on which of the several receipts stated in the first count he would proceed, and might be restrained from proceeding on more than one. But Le Blanc J. denied the application, as the receipts were charged to have been uttered at one and the same time, and might constitute only one offence of uttering many forged receipts (*a*). And accordingly it was proved that the several receipts there stated were forged, and were uttered at one and the same time, in one bundle, by the prisoner, by his giving them in to the solicitor of the navy board as vouchers to verify an account of the expenditure of one Collinridge, a public accountant deceased, for the purpose of getting such account passed at the navy board. And the jury found him guilty of the whole.

On a count for uttering several of such forged receipts, the Court will not put the prosecutor to his election on which receipt to proceed, if they be all uttered at the same time.

An objection was then stated by the prisoner's counsel, that the forging or knowingly uttering the receipts in question was not under the circumstances an offence within the meaning of the statute 2 Geo. 2. c. 25. s. 1. as they purported to be receipts given to Collinridge by persons employed by him, for money therein stated to have been paid to them for work and materials done and provided for the business in which he was employed under the navy board, and were produced by the prisoner as vouchers to accompany and verify Collinridge's accounts, in order to get them passed by the navy board; which accounts the prisoner had taken upon himself after Collinridge's death to get passed, in order to get rid of an extent which had issued against Collinridge's estate and effects. And it was urged in support of the objection, that these workmen were solely employed by Collinridge and not by the navy board; and that he and not the navy board were answerable to them. That therefore the board had nothing to do with these receipts, and it was indifferent to the board whether these sums had been paid to these several persons or not (*b*).

(*a*) *Vide* R. v. Young and others, 3 Term Rep. 98.

(*b*) The fact here assumed in the terms of the objection did not appear upon the evidence. On the contrary, it was understood that Collinridge was employed as agent to the board, and was to be paid what sums he had expended.

Judgment

Ch. XIX. § 36. *By stat.* 7 G. 2. c. 22. *Of warrant or order for money or goods.*

Judgment being respited, in order to submit these objections to the consideration of the Judges, on the 6th of November 1800 they all [absent Lawrence J.] held the conviction right; and that the receipts as stated were within the statute. And they also agreed that the prosecutor was not bound to proceed on one receipt only.

Vide Jones and Palmer's case, post. s. 6 C. S. P.

Warrant or Order for Payment of Money or Delivery of Goods.

§ 37. 7 G. 2. c. 22. Ante, 923.

It seems now settled that if the *warrant* or *order* mentioned in the stat. 7 Geo. 2. c. 22. do not purport on the face of it, or be shewn by proper averment, to be made by one having authority to command the payment of the money or direct the delivery of the goods, and to be compulsory on the person having possession of the subject matter of it; but only purport to be a request to advance the money or supply the goods on the credit of the party applying, which the other may comply with or not as he sees proper, it is not a warrant or order within the statute.

Rex v. Mary Mitchell, Kent, 1754, Fost. 119. *A note in the name of an overseer of the poor to a shopkeeper, desiring him to let the prisoner have certain goods which he would see him paid for, is not a* warrant *or* order *(which are used as synonymous terms) for delivery of goods within the statute.*

The Defendant was indicted for uttering and publishing the following false, forged, and counterfeited warrant and order for the delivery of goods:

" Mr. Jefferys, Oct. 16th, 1753.

" I desire you to let this woman have six yards of ordi-
" nary stuff, one pair of stockings, one shift, one apron,
" one handkerchief; and I will see it all paid for. Witness
" my hand,

" George May."

With intent to defraud W. Jefferys, &c.

The fact was, that the prisoner, pretending to be entitled to parochial relief in the parish of Maidstone, went to the shop of Jefferys with the order, pretending to have brought it from May, the overseer of the poor, and desiring him to let her have the articles on the credit of it. Jefferys suspecting the forgery had her secured. The prisoner was convicted; but Mr. Justice Foster respited judgment on a doubt whether such a writing were a warrant or order for the delivery of goods within the act; since if it had been genuine it would have amounted to no more than a request from May for the delivery of the goods on his credit, and an undertaking on his part to see them paid for. And on a conference of the Judges in July 1754, nine of them were clearly

of

Ch. XIX. § 37.

By stat. 7 G. 2. c. 22. *Of warrant or order for money or goods.*

of opinion that the writing was not a warrant or order for the delivery of goods within the act; considering that the words *warrant, or order*, as they stand in the act are synonymous, and import that the person giving such warrant or order has or at least claims an interest in the money or goods which are the subject matter of it, and has or at least assumes to have a disposing power over them, and takes on him to transfer the property or at least the custody of them to the person in whose favour such warrant or order is made. And though this case must fall within the mischief, yet in the construction of an act so penal the strict letter of it ought not to be departed from. One of the Judges doubted, but acquiesced. Another of them (Sir Sidney Stafford Smythe) dissented from the majority; considering that the stat. 7 Geo. 2. was made on purpose to take in cases which had not been provided for by the former act of the 2 Geo. 2., and therefore ought to receive a liberal construction. That the word *order* was in daily use among traders in a larger sense than was then contended for; extending to letters or messages between them, where one desires the other to send him a quantity of goods in the way of trade, without pretending to have any interest in or disposing power over them. That, had the order been genuine, and the goods delivered on the credit of it, May would have been liable, and Jefferys would have been defrauded. That therefore the case came within the mischief and the words of the act. The remaining Judge was absent. The prisoner was discharged.

Williams's case, Southampton Sum. Ass. 1775, cor. Nares J. MS. Crown Cas. Res. and MS. Gould J. (Serjt. Forster's MS. and 1 Leach, 134. S. C.)

George Williams was indicted for forging the following order for delivery of goods.

"Monday, 3 July 1775.

"Sir,

"Please to let the bearer Capt. Geo. Williams have 12 "barrels of tar; and in so doing you'll oblige your humble "servant to command,

"To Mr. Gilmore, Wm. Robinson.

"Gosport."

A note to a tradesman to let the bearer have certain goods is no order for delivery of them within the statute 7 Geo. 2 the writer having no previous interest in such goods.

With intent to defraud H. Lys, J. S., and N. Guildmore.

It appeared that Robinson, though a customer of Messrs. Lys and Co., was not the owner of or had any special interest in the goods in question, or any others in their hands; nor had any authority to send any such order, if it had been genuine.

Ch. XIX. § 37. *By stat. 7 G. 2. c. 22. Of warrant or order for money or goods.*

genuine. The prisoner was found guilty, but Nares J. respited judgment on the question, whether this were an order within the statute? And all the Judges (absent De Grey C. J. and Willes J.) in Michaelmas term 1775, agreed that it was not within it, upon the authority of Mitchell's case: though most of them said they should have doubted the propriety of that determination had it been res integra: but having been so long acquiesced in, they thought it could not now be departed from.

Ellor's case, O. B. May 1784, 1 Leach, 363.

So, a note in these terms, "Messrs. Songer, please to "send £.10 by the bearer, as I am so ill I cannot wait on "you. Eliz. Wery;" was holden not to be an order within the statute.

Clinch's case, O. B. Jan. 1791, cor. Perryn B. & Thomson B. MS. Jud. (2 Leach, 611. S. C.) *An indictment stating an order to deliver goods, purporting to be signed by one who was alleged to be the servant of the owner, but not stating that such servant had authority to make such order, is bad.*

In Clinch's case the indictment, which was on the same statute, for forging an order for the delivery of goods, stated in substance that on the 7th December 1790 James Lewis Desormeaux, silk-dyer, delivered to Frances Purser, silk-dyer, 78lb. of raw silk called Piedmont raw silk, of the goods and chattels of him the said J. L. D., to be sorted for dyeing; and that the prisoner well knowing the premises, feloniously forged, &c. a certain warrant or order for delivery of goods, with the name of L. Desemockex thereunto subscribed, purporting (*a*) to have been signed by one Lewis Desormeaux, by the name and description of L. Desemockex, he the said Lewis Desormeaux then and there being the servant of the said J. L. D. in his said business of a silk-dyer, and purporting to be a warrant or order from the said Lewis Desormeaux as such servant of the said J. L. D. for the delivery of 8lb. of the said raw silk, called, &c. parcel of the said 78lb. &c. to the bearer of the said warrant and order; the tenor of which, &c. is as follows;

"Please to send by the bearer 8lb. of that whorpe hun "market.

"L. Desemockex."

With intent to defraud the said J. L. D. &c. A 2d count was for uttering the same, and a 3d and 4th for forging and uttering it with intent to defraud Purser.

The prosecutor J. L. D. was a silk-dyer in Spitalfields, with whom the prisoner had lived a fortnight before the transaction happened as a journeyman or under servant in the warehouse, and James (the husband of Frances) Purser

(*a*) *Vide* post. s. 56.

was

Ch. XIX. § 37.

By stat. 7 G. 2. c. 22. *Of warrant or order for money or goods.*

was another servant. The prosecutor's business was in general, but particularly in his absence, under the direction of his son Lewis D., who was apprenticed to his father. On the 7th Dec. 1790 James Purser delivered the 78lb. of silk tied up in a bag to his wife, with directions to prepare it for dyeing. A few hours after, the prisoner called at Purser's house and asked for 8lb. of the silk, saying that he had been sent by Mr. Desormeaux to her for it, and producing at the same time the order in question. Mrs. Purser not knowing the person of the prisoner looked at the order, and asked him who wrote it? To whom he replied, Mr. Lewis Desormeaux; and she not knowing his hand-writing nor the manner in which he spelt his name, but believing the order to have come from him, knowing he had the management of this part of his father's business, delivered the 8lb. of the silk unwarped to the prisoner, understanding the words of the order *hun market* to mean silk without the threads round it. It was proved that no such order had ever been given either by the prosecutor or his son; and that the prisoner had converted the silk to his own use.

Several objections were urged on behalf of the prisoner; 1st, that to bring the offence within the act, the order must purport to be made by a person who had an authority, or at least claimed an interest in the subject matter of it; and who takes upon him to transfer it to the person in whose favour the order is made. That it was not averred in the indictment that L. Desormeaux, whose order it purports and is averred to be, had any authority over or interest in the goods in question, or any authority to make such an order, which ought to have been expressly alleged. It states that another person was the owner, namely the father J. L. D., to whom the son was only a servant; and it cannot be inferred from that circumstance that the son had authority over the goods; and the want of such an averment cannot be supplied by parol evidence: on the contrary the order appears to have been made by an apprentice who was not sui juris and had no disposing power. 2. That the instrument in question was not an order but a bare request. 3. That it was not directed to any person, and consequently was not upon the face of it compulsory upon the holder of the goods. 4. That further it ought to have appeared on the face of the

Ch. XIX. § 37. *By stat.* 7 G. 2. c. 22. *Of warrant or order for money or goods.*

the indictment that the order was to the holder of the goods. The jury having found the prisoner guilty, judgment was respited to take the opinion of the Judges on these points; and on the 11th of May 1791 they held the conviction bad.

2 Leach, 611.

The printed report states that at the June sessions following Mr. Baron Perryn, in delivering the opinion of the Judges, stated, 1st, that on the construction of the statute the forged warrant or order for the delivery of the goods must purport to be the order of the owner, or of some person who has or at least claims an interest in, or who has or at least assumes to have a disposing power over the goods, and takes upon him to transfer the property or custody of them to the person in whose favour such order is made. For which he referred to Mitchell's case, Williams's case, and Jones's case. Again, that the order must be directed to the holder of or person interested in or having possession of the goods. Now the order set forth in the indictment was not directed to any person whatsoever; but merely expressed a desire that 8lb. of silk should be delivered to the bearer of it, without any direction from whom it was to be received. On that ground therefore the Judges were of opinion that this was not a warrant or order within the statute. 2dly, As to the form of the indictment, that it ought to have appeared in the indictment that the person whose name was subscribed to the order had an authority to make it; but that could not be collected by any legal inference from the words of the present indictment; for L. Desormeaux, the person whose name is forged, is stated to be the *servant* of the owner, which excludes every idea that he had or could claim any interest in the goods which were the subject of the order: it ought to have been expressly averred that he had authority to make it. That on this ground the Judges were of opinion that judgment must be arrested.

Vide Sess. Pap. of June 9th, 1791.

(It is sufficient however if the order on the face of it purport that the party making it had such authority, though in truth he had it not; *vide* infra, and Mitchell's case, Post. 119.)

§ 38. *Order made by one who has no right.*

But if it purport to be an order which the party has a right to make; although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it falls within the penalty of the act.

Rex v. Lockett, O. B. June 1772, MS. Crown Cas. Res. 40. and MS. Buller J.

Charles Lockett was convicted of knowingly uttering a forged order for the payment of money in these words: "Messrs. Neal, Fordyce, and Down, pay to Wm. Hop-

"wood

"wood or bearer £.16 : 10 : 6. Rt. Vennest." With intent to defraud John Scoles. Ch. XIX. § 38. *By stat. 7 G. 2. c. 22. Of warrant or order for money or goods.*

The case was, that the prisoner applied to Scoles a colourman, and agreed to purchase goods to the amount of £.10 : 0 : 6, which he was to send for; and he took away with him a little Prussian blue. He came again, pretending to be in a hurry, and presented this note, which he said was a good one; and Scoles gave him 6*l.* 10*s.*, being the difference. No such person as Rt. Vennest kept cash with Messrs. Neale and Co.; nor did it appear that there was any such man existing. The question submitted to the Judges was, whether this were an order within the statute, being in the name of a fictitious person? the doubt arising on what is said in Mitchell's case. The Judges after very long consideration at last agreed in Trin. term 1774 that this was forgery. They thought it quite immaterial whether such a man as Vennest existed or not; or if he did, whether he had kept cash at the banking house of Messrs. Neale and Co.: it was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property. (1 Leach, 110. S. C.) *A forged order on a banker for the payment of money, purporting to be made by one who kept cash with him, is within the statute, though made in a fictitious name, or in the name of one who had no authority to draw on him.*

A like case occurred in all its circumstances in the April sessions 1774, at the Old Bailey, in the case of one Abraham Abrahams, wherein judgment was respited, as Lockett's case was then undetermined. They were both decided at the same time, and the prisoners received judgment of death in the July following. Abraham's case, O. B. April 1774, Serjt. Forster's MS.

§ 39.

It does not appear necessary that the particular goods should be specified in the order, provided it be conceived in terms intelligible to the parties themselves to whom such order is addressed. *What is a sufficient specification of the goods.*

John Jones was indicted for forging an order for the delivery of goods to this purport; "Sept. 23d, 1764. Sir, "please to deliver my work to the bearer. Lydia Bell, "Fleet-street, London;" with intent to defraud the wardens and company of Goldsmiths. Jones's case, O. B. 1764, cor. Smythe B. Lord Mansfield, and Bathurst J. 1 Leach, 63. *Forging an order in the name of a silversmith for redelivery of plate from Goldsmiths' hall in these terms, "Please to deliver my work," is within the statute.*

Mrs. Bell, a silversmith, sent several articles of plate to Goldsmiths'-hall to be marked. The form of the order was the same as is usually sent upon such occasions; except that in

Ch. XIX. § 39. *By stat. 7 G. 2. c. 22. Of warrant or order for money or goods.*

in strictness and by the rule of the plate-office the several sorts of work with the weight of the silver ought to have been mentioned in it. The fact of the forgery was proved; and the prisoner was convicted. And upon reference to the Judges, after a motion in arrest of judgment, on the form of the order, the conviction was affirmed: but the prisoner was pardoned on condition of transportation.

M'Intosh's case, O.B. Sept. 1800, cor. Le Blanc J. MS. Jud. *"Please to pay to Y. &c. all my proportion of prize-money due to me for my services on board," &c. signed in the name of a seaman on board the ship, is an order for payment of money or bill of exchange, the forgery whereof is felony. And this though the stat. 32 Geo. 3. c. 34. s. 2. enacts that no such order made by any seaman discharged from the service, and within seven miles of the port where his wages are payable at the time of such order made, shall be good and valid, and sufficient for receiving the money; and it appeared that the party whose name was forged was in fact in that predicament when the order bore date; but the order itself purported on the face of it to be made at another place beyond the limited distance.*

James M'Intosh was convicted of forging, and uttering knowing to be forged, a certain order for payment of money in the words and figures following: "Petersfield, 6th August 1799. Sir, Please to pay on demand to Mr. Hugh Young or order all my proportion of prize-money, due to me for my services on board his Majesty's ship Leander, for which this shall be your authority. Witness my hand,

"John Johnson,

"To Alex^r Davison Esq. ⋈

"No. 21, Milbank-street, Westminster. his mark.

"Signed before us,

"Walter Noble, minister.

"John Williams, } church-

"Franc^s Gibbons, } wardens.

In two counts it was called an order for payment of money; and in two other counts a bill of exchange; and it was stated to have been forged and uttered with intent to defraud John Johnson. Four other counts charged the offence to have been committed with intent to defraud Alexander Davidson.

The evidence of the prisoner having actually forged as well as uttered and received the money, viz. 14*l.* 10*s.* 6*d.* from the prize agent under the above order was clearly proved. But it was objected on the part of the prisoner, first, that this was not a bill of exchange, nor an order for payment of money, within the stat. 7 Geo. 2. c. 22.; because no sum of money was mentioned; and it was not certain that any money would be due to Johnson. And secondly, that this instrument was void under the stat. 32 Geo. 3. c. 34. s. 2., which enacts, "that no letter of attorney or order "made or executed by any petty officer, seaman, &c. who "shall have been discharged from the service of his Majesty, "and who shall be at or within the distance of seven miles "from any of the ports where seamen's wages are paid for

"such

" such service at the time of making such letter of attorney, " shall be good and valid, and sufficient for receiving the " whole or any part of the wages, prize money, or other " allowances of money due or to grow due to such petty " officer, seaman, &c. for such service; unless such letter " of attorney or such order shall be signed before and at- " tested by a clerk of the treasurer of the navy at such port, " or by the inspector of seamen's wills and powers of attor- " ney."

Ch. XIX. § 39. *By stat. 7 G. 2. c. 22. Of warrant or order for money or goods.*

It appeared from the evidence of Johnson, whose name had been forged, and who had since been paid all his prize money by the agent, that at the time when the instrument bears date, viz. 6th August 1799, he was not discharged from his Majesty's service, but was on board a ship on his passage home from Minorca; and that he did not arrive at Portsmouth till the first of October, when he was discharged from the service, and had since resided in Scotland: this evidence put an end to the objection in point of fact. But after the close of the session a certificate was sent to the learned Judge who tried the prisoner from the office for sick and wounded seamen, which stated that John Johnson was received on shore at Hasler from his Majesty's ship Leander on the 3d of August 1799, and discharged out of the service on the 5th of August 1799. The report of the prisoner's case was therefore deferred, in order that the opinion of the Judges might be taken, whether supposing the fact to have been that John Johnson, the person whose name was forged, was discharged from the service at the time the instrument bears date, and was within 7 miles of a port where seamen's wages were paid, the forging such instrument not signed or attested according to the stat. 32 Geo. 3. c. 34. s. 2. would be felony? As also on the first point, whether it be either an order for payment of money or bill of exchange. The case stood over for consideration; and afterwards the Judges held the conviction proper.

§ 40. *Instruments of other specific denominations may be laid as warrants or orders, if in effect such.*

And even those instruments which in the commercial world have peculiar denominations, yet if they fall within these terms and are in truth warrants or orders for payment of money, may be laid to be such: of this Lockett's case before mentioned is an example.

In Ante, 940.

Ch. XIX. § 40. *By stat.* 7 G. 2. c. 22. *Of warrant or order for money or goods.*

In Shepherd's case the form of the forged instrument was as follows: "Green-st. 31st July 1791. Sirs, Pray pay to "Mr. John Atkins or bearer the sum of six pounds six "shillings, value received. Yours, &c. H. Turner. "Messrs. Brown, Collinson, and Co. Lombard-street." Which was laid in the indictment to be an order for payment of money; and one of the objections was, that it ought to have been laid to be a bill of exchange, according to the case of Grant and Vaughan. But in Michaelmas term 1781, the Judges were unanimously of opinion that it was properly laid: and it was observed that the indictment and draft were the same as in Lockett's case, where all the Judges held the conviction proper; and that every bill of exchange seemed to be an order for payment of money, though not vice versâ.

Rex v. Shepherd, O.B. Sept. 1781, MS. Crown Cas. Res. 117. and MS. Gould and Buller Js. (1 Leach, 265. S. C.) *Vide* post. s. 50. S. C. more at large on another point. *A bill of exchange may be laid as an order for payment of money.*

In Willoughby's case mentioned in another place the following instrument, which had been stolen out of a letter, was laid in the indictment and holden to be a warrant for payment of money.

Vi. 1 Bl. R. 485. Willoughby's case, Warwick Lent Ass. 1783, *Vide* S. C. ante, tit. Larceny, &c. p. 581, 2. MS. Crown Cas. Res. MS. Gould and Buller Js. and MS. Jud. *A bill of exchange or banker's draft may be charged as an order for payment of money.*

"Post Bill.

"No 6127. Birmingham, 13 Febry 1783.

"Sir Wm. Lemon, Bt. and Co. Bankers, London,

"Pay 5 Gas to Mr. Richd. Moore or bearer, on de-
"mand, value received.

"Receᵈ 5 Gas Robt Coales.

"Entᵈ R. Moore."

After conviction, this was contended not to be a warrant for payment of money, but a note or bill of exchange, which are mentioned in the stat. 2 Geo. 2. c. 25. the omissions in which the stat. 7 Geo. 3. c. 22. on which the indictment was framed, was meant to supply. But in Easter term 1783 (*a*) the Judges all finally concurred in opinion that the indictment

(*a*) Upon adverting to the stat. 7 Geo. 2. c. 22. I find that Mr. Justice Buller's observation on it in the note of his own opinion before given in p. 581, 2. upon this case is not quite accurate; for he laid stress upon the words "*other* warrant," which he supposed to be used in the act, as shewing that the legislature must have intended some *other* warrant for payment of money than a bill of exchange: but no such words are to be found in the act coupled together; though perhaps a similar argument may be drawn from the true wording of it; for it enumerates specific instruments, amongst others, *bills of exchange*, as included in the stat. 2 Geo. 2. which it recites; and further recites that *no punishment is inflicted by*

indictment was well laid; for though it was a bill of exchange, it was also a warrant for the payment of money; it was, if genuine, a voucher to the bankers or drawees for the payment.

Ch. XIX. § 40.
By stat. 7 G. 2. c. 22. Of warrant or order for money or goods.

§ 41.
Not confined to commercial transactions.

It appears from the case of M'Intosh before mentioned that the statute is not confined to commercial transactions. This was once pressed and overruled in the case of George Graham, who was indicted and convicted for forging an order for payment of money, which appeared to be an order of a justice of peace for the county of Middlesex upon the high constable of a division, or the treasurer of the county, to pay a reward of 10*s.* to the prisoner for the apprehension of a vagrant under the stat. 17 Geo. 2. c. 5. s. 5. Another objection however which was there taken seems to have been entitled to a different consideration from what it is stated to have received, namely, that the 18th s. of the stat. expressly subjects the party forging such an order to a penalty of 50*l.* which was contended to be a repeal as to such orders of the prior stat. 7 Geo. 2. The prisoner was notwithstanding convicted and received judgment. But the jury recommended him to mercy (*a*). A similar objection to the last was made and prevailed in the case of Davies, upon the acts against deer stealing.

Ante, 942.
R. v. Graham, O. B. Oct. 1778, cor. Blackstone J. and Eyre B. and the Recorder. Serjt. Forster's MS.

Ante, 609.
But see stat. 42 G. 3. c. 107. since passed.

§ 42.
Bankers' notes, &c.

Besides the general acts of the 2 & 7 Geo. 2. already mentioned, respecting the forgery of bills of exchange and promissory notes, &c. further provision has been made with respect to securities of this nature in the case of bankers using certain printed forms of such securities, or paper of a particular description.

41 G. 3. (U. K.) c. 57.
Making, &c. frame or mould for making paper, with the name or firm of any banker visi-

The stat. 41 Geo. 3. c. 57. entitled "an act for the better prevention of the forgery of the notes and bills of exchange of persons carrying on the business of bankers," reciting that whereas it is expedient to prevent the crime of forgery in all parts of the united kingdom of Great Britain

by the said act on such as forge *any warrant or order for payment of money*, &c. which, according to his argument, must therefore mean something else than a bill of exchange, such, he observed, as warrants from some of the public boards for payment of money, which were specific things differing from bills of exchange, &c.

(*a*) *Qu.* What became of the case?

Ch. XIX. § 42. *By stat.* 41 G. 3. c. 57. *Of Bankers' notes, &c.*

and Ireland, it is enacted, "That if any person or persons in any part of the united kingdom of Great-Britain and Ireland (after the 10th of July 1801) shall make, or cause or procure to be made, or knowingly aid or assist in the making or using of any frame, mould, or part of any frame or mould, for the making of paper, with the name or firm appearing visible in the substance of the paper, of any person or persons, body corporate, or other banking company or partnership, carrying on the business of bankers, without an authority in writing for that purpose from such person or persons, body corporate, or other banking company or partnership, or from some person or persons duly authorized to give such authority; or shall manufacture, make, vend, expose to sale, publish, or dispose of, or cause or procure to be manufactured, made, vended, or exposed to sale, published, or disposed of, any paper having the name or firm, appearing visible in the substance of the paper, of any person or persons, body corporate, or other banking company or partnership whatsoever, carrying on the business of bankers; or if any person or persons, without such authority, shall by any art, means, mystery, or contrivance, cause or procure, or shall knowingly aid or assist in causing or procuring, the name or firm of any person or persons, body corporate, or other banking company or partnership, carrying on the business of bankers, to appear visible in the substance of the paper whereon the same shall be written or printed; every person or persons so offending in any of the cases aforesaid, and being convicted thereof, shall for the first offence be imprisoned for any time not exceeding two years, nor less than six months; and for the second offence be transported to any of his Majesty's colonies or plantations for 7 years."

ble in the substance of it, without a written authority for that purpose; or vending or exposing to sale, &c. such paper; or by any means procuring, &c. such name or firm so to appear visible in the substance of any paper whereon the same shall be written, &c. two years imprisonment for first offence, and for second offence transportation for seven years.

The like punishments for engraving, &c. without authority any bill or note of any banker, or using plate so engraved; or knowingly having such in custody, or uttering, &c. such bill, &c.

(Sect. 2.) enacts, "That if any person or persons, in any part of Great Britain and Ireland (after the 10th of July 1801) shall engrave, cut, etch, scrape, or by any other means make, or shall cause or procure to be engraved, &c. or by any other means or device made, or shall knowingly aid or assist in the engraving, &c. or by any other means or device making, in or upon any plate whatsoever, any bill of exchange, promissory note, or other note for the payment of money, or part of any bill of exchange, promissory note, or other note for the

"pay-

Ch. XIX. § 42.

By stat. 41 G. 3. c. 57. *Of Bankers' notes, &c.*

" payment of money, purporting to be the bill of exchange, " promissory note, or other note for the payment of money, " of any person or persons, body corporate, banking com- " pany or partnership, carrying on the business of bankers, " without an authority in writing for that purpose from " such person or persons, body corporate, banking company, " or partnership, or some person or persons duly authorized " to give such authority; or shall use any such plate so en- " graved, cut, etched, scraped, or by any other means or " device made, or shall use any other device for the making " or printing any such bill of exchange, promissory note, or " other note for the payment of money, without such au- " thority in writing as aforesaid: or if any person or persons " shall (after the said 10th of July 1801), without such au- " thority as aforesaid, knowingly have in his her or their " custody any such plate or device, or shall without such " authority as aforesaid knowingly and wilfully publish, " dispose of, or put away, any such bill of exchange, pro- " missory note, or other note for the payment of money, or " part of such bill of exchange, promissory note, or other " note for the payment of money; every person so offend- " ing in any of the cases aforesaid, and being convicted " thereof, shall for the first offence be imprisoned for any " time not exceeding two years nor less than six months, " and for the second offence be transported to any of his Ma- " jesty's colonies or plantations for the term of seven years."

Engraving, &c. on plate any subscriptions subjoined to any bill, &c. of any bankers payable to bearer on demand, purporting to be the bill, &c. of such bankers; or knowingly having such plate in possession, &c. for first offence imprisonment (from 12 months to 3 years), and for second offence transportation for seven years.

Sect. 3. enacts, " That if any person or persons in Great " Britain and Ireland (after the 10th of July 1801) shall en- " grave, cut, or etch, or by any other means or contrivance " trace with a hair stroke or other mode of delineation " or (*a*) any plate whatsoever any of the subscriptions sub- " joined to any bill of exchange, promissory note, or other " note for the payment of money, of any person or persons, " body corporate, or other banking company, or partnership " carrying on the business of bankers, to be payable to " bearer on demand; or shall have in his her or their pos- " session any plate with the hair strokes or other delineation " of any subscription traced thereon, subjoined to any bill of " exchange, promissory note, or other note for the payment " of money, purporting to be the bill of exchange and pro- " missory note, or other note for the payment of money, of " any person or persons, body corporate, or other banking " company

(*a*) Misprinted for *on*.

Ch XIX. § 42. *By stat.* 41 G. 3. c. 57. *Of bankers' notes, &c.*

" company or partnership, carrying on the business of " bankers, and to be payable to the bearer on demand, and " shall not be able to prove that such plate came into his her " or their possession without his her or their knowledge or " consent; every person so offending in any of the cases " aforesaid, and being convicted thereof, shall for the first " offence be imprisoned for any time not exceeding three " years, nor less than twelve months; and for the second " offence be transported to any of his Majesty's colonies or " plantations for the term of seven years."

§ 43. IV. *How far the Validity in Law of the Thing forged, supposing it were genuine, is essential to Forgery.*

2 MS. Sum. 343. 1 Hawk. ch. 70. s. 7.

It is said to be no way material whether a forged instrument be made in such a manner as, were it true, it would be of any validity or not. But this I conceive must be understood where the false instrument carries on the face of it the semblance of that for which it is counterfeited, and is not illegal in its very frame. Upon this ground it has been adjudged that the forgery of a protection in the name of one as being a member of parliament, who in truth was no member at the time, is as much an offence at common law as if he were so.

R. v. Deakins, 1 Sid. 142.

Japhet Crooke's case, ante, 921. And *vide* King's case, 1 Keb. 803. & 3 Keb. 51.

In Japhet Crooke's case before mentioned, who was indicted upon the stat. 5 Eliz. c. 14. where the conveyance described the estate intended to be affected by a wrong name: and was therefore considered to be ineffectual at law, if genuine, to pass the property intended, (though some of the Judges thought that equity would have decreed a proper conveyance,) yet the forgery was holden to be indictable upon the statute.

Coogan's case, O. B. 1787. MS. Buller J. (2 Leach, 503. S. C.)

Coogan was indicted (*a*) and convicted for knowingly publishing as true, &c. a certain false will and testament of one James Gibson, late a seaman belonging to a merchant

(*a*) It is observed in 2 Leach, 503. that the indictment was framed on the stat. 2 Geo. 2. c. 25. and not on the stat. 31 Geo. 2. c. 10. s. 24. which is confined to seamen on board the king's ships. This last statute has the words " *last* will," the other the word " *will*" only.

vessel,

vessel, &c. The fact was clearly proved, but it appeared that J. G. was *living:* and therefore it was objected that the case was not within the statute, inasmuch as during the life of the party his will was ambulatory, and could have no validity as a will till his death; and so could not properly be called the last will and testament of J. G.; and there cannot be a forgery of a thing which neither did nor could exist at the time of the forgery. But in Michaelmas term 1787 all the Judges held the conviction proper. It was sufficient, they considered, that it purported on the face of it to be a will. That the objection was only applicable to the effect which a will has in law, and not to the fact of making it. It was observed then, and afterwards more largely at the time of delivering the opinion of the Judges on the case, that every will must be made in the lifetime of the party whose will it was. It existed as a will in his lifetime, though not to take effect till his death: and that the making a false instrument importing on the face of it to be a will was equally forgery whether the person whose will it purported to be were dead or alive at the time of making it. That a contrary doctrine would operate as a repeal of the law; for if the act of making the will were not forgery at the time, a publication afterwards would not make it so. Buller J. thought that the very definition of forgery decided the doubt, for it was the making a false instrument with intent to deceive. That here the intention to deceive had been established by the jury, and the instrument purporting to be a will was clearly false. Also several express authorities were referred to, where the forgery was holden to be committed during the life of the person whose will the forged instrument purported to be. In 3 Inst. 170. it is laid down that if one who writeth the will of a sick person inserteth therein a clause concerning the devise of lands falsely, without any warrant or direction of the devisor; albeit he did not forge or falsely make the whole will, yet he is punishable by the stat. 5 Eliz. c. 14., the words of which are the same to this purpose as the statute in question: and it is apparent that in such a case the forgery must be committed during the life of the person whose will it purports to be. Again, in the case of Timothy Murphy, who was tried (R. v. Murphy, 10 St. Tr. 183.)

Ch. XIX. § 43.

Validity in law of the thing forged, if genuine.

Forging the will of a person living is a capital offence within the stat.

Ch. XIX. § 43. *Validity in law of the thing forged, if genuine.*

tried at the Old Bailey in January 1753, upon a statute similar to the 31 Geo. 2. c. 10. for forging a seaman's will who it appeared was still alive, and had returned to England two years after the prize money had been received by the prisoner under the forged will; he was convicted without any question or doubt. So also in Rex v. Sterling, Mrs. Shutter, whose hand-writing to her supposed will was forged by the prisoner, appeared in court at the trial, and gave evidence, and the prisoner was convicted and hanged. The prisoner Coogan in consequence received sentence of death at the Sessions in June 1787.

(R. v. Sterling, O. B. Sept. 1773. (*a*).)

Vide 2 Leach, 505.

Upon the same principle have all those cases turned which will be particularly considered under the next head of inquiry, where different instruments have been forged in the names of persons who had no existence, and which consequently could by no possibility have any legal operation; because upon the face of them they purported to be valid instruments.

§ 44. *Degree of similarity between the true and counterfeit instrument.*

I have before had occasion to remark, that in order to constitute forgery it is not necessary there should be a perfect resemblance between the false instrument and that which is intended to be imitated: if they be so far alike that the deception is calculated to impose upon persons in general it is sufficient; though it would not impose on persons having particular experience in such matters. This was so ruled in a very late case by Le Blanc J. upon an indictment against one Hoost for forging, &c. bank notes. A person from the Bank, by whom the forgery was proved, said, that he could not have been imposed upon by the counterfeits, the difference between those and the true notes being to him so ap-

R. v. Hoost, Exeter Sp. Ass. 1802, MS.

(*a*) In the printed report of this case, 1 Leach, 117. it is noted that the probate was not recalled at the time of the trial. This was observed with reference to the case of R. v. Vincent, as reported in 1 Stra. 481. (and *vide* the same book, 671. and R. v. Rhodes, ib. 703. and 1 Wils. 751.) where on an indictment for forging a will of personal estate the probate was holden to be conclusive evidence in support of the will. But see the observations made on Vincent's case by the counsel for the prosecution in the case of the dutchess of Kingston, 11 St. Tr. 222, 3. &c. and the cases there opposed to it.

parent

parent in several particulars pointed out by him. But in the same case it appeared that others had been deceived at first by them, though the counterfeits were very ill executed.

Ch. XIX. § 44.
Validity in law of thing forged, if genuine.

James Elliot was indicted for forging the following note:

Elliott's case, Maidstone 1777, MS. Crown Cas. Res. 84. Serjt. Foster's MS. (1 Leach, 210. S. C.)

"No. 17. 73.

"I promise to pay Mr. Jos. Crook or bearer, on de-
"mand, the sum of Fifty

"London, 20 June 1775.

"£. Fifty. For the Govr & Company of the Bank of England.

"Entd C. Blewart. Thos Thompson."

A counterfeit Bank note without the water-mark is a forged promissory note for the payment of money within the stats. 2 G. 2. c. 25. & 31 G. 2. c. 22. *though the word* Pounds *be omitted in the body of it, which was supplied by the "£. Fifty" in the margin.*

In some of the counts the instrument was stated to be a bank note, in others a note in the form of a bank note; but the 5th count, which was the one relied on, and on which the question turned, charged that the prisoner feloniously forged, &c. "a certain promissory note for the payment of "money, with the name of Thomas Thompson thereto sub-"scribed, purporting to bear date, &c. and to have been "signed by one Thomas Thompson for the governor and "company of the Bank of England for the payment of 50*l.* "to Mr. J. C. or bearer on demand, (the tenor of which "was set forth as above), with intent to defraud the gover-"nor and company of the Bank of England."

It appeared in evidence that the note in question both in paper and print much resembled a real bank note, but that in the frabrick of the paper, which was rather thicker than the bank paper, there was wanting what is called the water-mark, namely the words "Bank of England;" that the number was not filled up; and that in the body of the note the promise was only to pay the sum of "fifty," the word "pounds" not being added in writing, as is usually done in such notes as have not the word *pounds* engraved therein, being calculated for the insertion of broken sums; but at the bottom of the note there was engraven £.50. The fact of the forgery was brought home to the prisoner, though the note was never published, it having been found in his possession at the time he was seized; and he was convicted. But on these circumstances it was urged that this was not a note resembling a bank note for want of the water-mark; neither

Ch. XIX. § 44. *Validity in law of thing forged, if genuine.*

neither was it a note for fifty *pounds*, as the word *pounds* was not inserted: and on these doubts judgment was respited for the opinion of the Judges; who in Michaelmas term 18 Geo. 3. were clearly of opinion that the conviction was proper. For first, in forgery there need not be an exact resemblance; it is sufficient that the instrument is primâ facie fitted to pass for a true one. Secondly, the major part inclined to think that the omission of *pounds* in the body of the note, had nothing else appeared, would not have exculpated the prisoner; but it was matter to be left to the jury, as was done in this case, whether it purported to be a note for *50l.* or any other sum; but all agreed that the £.50 in the margin removed every doubt, and shewed that the *fifty* in the body of the note was intended for *pounds*.

(Absent De Grey C. J. and Smythe C. B.) *Vide* ante, s. 6.

§ 45. *The counterfeit must substantially and essentially answer the description in the indictment of the instrument alleged to be forged.*

But though a similarity to a common intent be sufficient, yet it is necessary that the forged instrument should in all essential parts have upon the face of it the similitude of a true one; so that it be not radically defective and illegal in the very frame of it.

Jones's case, ante, 883.

In Jones's case one set of counts laid the forged instruments to be a paper writing purporting to be *a bank note*. In another set it was charged as purporting to be a promissory note for payment of money. The note was, "I promise "to pay *for self and company of my bank in England*," &c. without any signature; and the court of B. R. held clearly that the prisoner was entitled to an acquittal.

Fawcett's case, ante, 862.

So one of the objections in Fawcett's case was, that the instrument forged (which was an order in the name of a creditor to the gaoler for the discharge of a debtor who was in prison under an attachment for a contempt) was a mere nullity in itself, even if genuine: though it does not appear whether the Judges decided the case on that ground: for at any rate the indictment was holden good as for a cheat.

Reading's case, post. s. 56.

In Reading's case the bill was directed to John *Ring*, and the acceptance was by *John King*. The indictment stated that the bill purported to be directed to John *King* by the name of John *Ring*, and that the prisoner forged the acceptance in the name of John King; but judgment was arrested because *Ring* could not purport to be *King*.

Ante, 938.

Yet it seems that a mere literal mistake in the framing of the instrument itself, if well laid in the indictment, will make no

no difference. In Clinch's case, where the prisoner in forging an order for the delivery of goods blundered in spelling the name of *Desmockex* instead of *Desormeaux*, no stress was laid on this, though on other grounds the indictment was holden bad. Ch. XIX. § 45. *Validity in law of thing forged, if genuine*

Fitzgerald and Lee were indicted for forging the will of *Peter* Perry, late a seaman on board his Majesty's ship Lancaster, with intent to defraud the King. The will began, "I *Peter* Perry," and ended R. v. Fitzgerald and Lee, O. B. Sept. 1741, 1 Leach, 24.

his
"John ⋈ Perry,
mark."

It appeared in evidence that Fitzgerald had carried the will to the proper officer, who on observing the difference of the christian names required him to account for the error before the probate could be granted. He accordingly produced the other prisoner Lee; who in the name of Welch swore that he was one of the subscribing witnesses: that the name of the deceased was *Peter* Perry, who had made his mark to and delivered the will: that he Welch had by mistake written the name of *John* instead of Peter; upon which the probate was granted. It was objected that this was no forgery of the will of PETER Perry as laid in the indictment; and the case was reserved for the opinion of the Judges, and considered by them in Michaelmas term 15 Geo. 2. Their opinion was never publicly delivered; but the prisoners were afterwards executed pursuant to their sentence.

But where Thos. Wall was convicted upon an indictment for forging and knowingly uttering a will of land (*a*) of one John Skidmore deceased, attested by only two witnesses; and it did not appear in evidence (*b*) what estate the supposed testator Wall's case, Worcester Sp. Ass. 1800, cor. Thompson B. MS. Jud.

(*a*) The will set out was of this tenor: "Dec. 6th, 1795. I John Skidg-"mer give and bequeath to Thos. Wall all the said premises belonging "to the said John Skidmer which he baut of the said Thos. Wall and "Sarah Hasten. He pays rent so long as mee and my wife lives, and at "our deces he shall have all the said premises again. He shall not "mortgeg nor sell the said premises so long as he lives, to be left to his "children if the be the longest livers, or eles to the nerest friend he has— "John Skidmore—
"Witness my hand, John Collet and Richd. Wall."

(*b*) It was suggested to be only leasehold, but no proof was given of it. Skidmore died in August 1794 without issue, and his widow died in 1795; after

Ch. XIX. § 45. testator had in the land so devised, or of what nature it was; wherefore it might be presumed to be freehold, and therefore the will void and of none effect by the express enactment of the statute of frauds, (29 Car. 2. c. 3. s. 5.) for want of the attestation of three witnesses; the Judges on conference in Easter term 1800 held the conviction wrong; for as it was not shewn to be a chattel interest, it was to be presumed to be freehold. The following case was referred to as decided upon the same principle.

Validity in law of thing forged, if genuine.

There can be no forgery of a will of land attested only by TWO *witnesses.*

Moffat's case, O. B. Jan. 1787, MS. Buller J. (2 Leach, 483. S. C.)

Forgery of a bill of exchange, *as such, cannot be committed, where it is drawn for more than 20s and less than 5l. without mentioning the place of abode of the payee and having a subscribing witness thereto, being in such case declared absolutely void by stat.* 17 Geo. 3. c. 30.

John Moffatt was indicted for knowingly uttering as true a forged acceptance, purporting to be the acceptance of Geo. Peters on a bill of exchange, the tenor of which was as follows:

"Navy Office, 21st Dec. 1786.

"Sir, Seven days after date please to pay to Mr. John "Moffatt or his order £.3 : 3. and place the same to the "account of, &c. Walter Stirling.

"To George Peters Esq. Bank of England.

"Accd George Peters."

with intent to defraud W. Ball.

The bill produced agreed with the indictment. But the question was whether this amounted to forgery, the bill in question not specifying the place of abode of the payee, nor being attested by any subscribing witness; under which circumstances the bill being for less than 5*l.* is by stat. 17 Geo. 3. c. 30. s. 1. declared to be void; and after conviction all the Judges in Hilary term 1787 held the conviction wrong: for if it had been a genuine instrument, it would have been absolutely void, and nothing could have made it good. And since the statute such an instrument is no bill, and has not the appearance or semblance of one. And this was distinguished, on the conference, from Hawkeswood's case after mentioned, where the holder of the bill had a right to get it stamped, and the stamp-act only says that it shall not be used in evidence till stamped.

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after whose death the prisoner, who was then in possession as tenant to Skidmore of some small premises at the rent of about 30*s*. per ann. (of which premises he had formerly been the owner, applied to one Joseph Buston, who had married a niece of the widow, to continue tenant to him at the old rent; to which Buston agreed. And in Sept. 1798 the prisoner produced and proved the will in question in the ecclesiastical court at Worcester; on which administration with the will annexed was granted to him as universal legatee.

Hawkes-

Ch. XIX. § 45.

Validity in law of thing forged, if genuine.

Stamps.

Hawkeswood was indicted for forgery of a bill of exchange; and objection was taken that not being stamped it was no bill of exchange by stat. 22 Geo. 3. c. 33. and prior acts: and that this was an objection apparent upon the face of it; and no person could be deceived or defrauded thereby, unless he took it without looking at it, which would be gross negligence. But as the stamp act was merely a revenue law, and did not purport in any way to alter the crime of forgery; and as the false instrument had the semblance of a bill of exchange, and was negotiated by the prisoner as such; Buller J., before whom he was tried, over-ruled the objection, but respited judgment. And in Easter term 1783 all the Judges were of opinion that the prisoner was properly convicted: for the stamp act in saying that a bill without a stamp shall not be pleaded or given in evidence, or be available in law or equity, means only that it shall not be made use of to recover the debt: and besides, the holder might get it stamped after it was made.

Hawkeswood's case, Worcester Sp. Ass. 1783, MS. Buller J. and MS. Crown Cas. Res. 140. (1 Leach, 292. S. C.)

Forgery may be committed of a bill of exchange on unstamped paper.

The above case was confirmed in Rex v. Morton, which was an indictment for knowingly uttering a forged promissory note, as it appeared at the trial, on unstamped paper. The case underwent much consideration, and was debated by the Judges in Michaelmas term 1795, and in Hilary and Easter terms 1796, on the principal point, as well as upon the question, whether the stat. 31 Geo. 3. c. 25. s. 19., which passed after Hawkeswood's case, and prohibits the stamp to be affixed afterwards, had made any difference. And though two or three of the Judges doubted at first the propriety of Hawkeswood's case if the matter were res integra, yet they all agreed that being an authority in point they must be governed by it; and that the stat. 31 Geo. 3. c. 25. s. 19. made no manner of difference in the question; for that the only thing to be regarded was the state of the note at the trial, and not what might be its state afterwards. And most of the Judges maintained the principle of Hawkeswood's case to be well founded: for they held that the acts of parliament which had been referred to and relied on, being mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for the purpose of recovering on it in a court of justice; but it might be received in evidence for a collateral pur-

Morton's case, York Sum. Ass. 1795, MS. Jud.

Forgery may be committed of a promissory note on unstamped paper even since the stat. 31 Geo. 3. c. 25. s. 19. which prohibits the stamp to be affixed afterwards.

Ch. XIX. § 46. *In fictitious names or false characters assumed.*

Mr. Justice Yates accordingly tried the prisoner at Bodmin, in 1767, but the jury acquitted him.

James Bolland was indicted for forging an indorsement in the name of James Banks, on the back of a promissory note for 100*l.*, drawn by Thomas Bradshaw, and indorsed by Samuel Pritchard: which note was set forth in the indictment, and the offence laid to be done with intent to defraud F. L. Cardeneaux. There was another count for uttering the same. The drawer and payee were real persons, and Bolland into whose hands the note came indorsed it with his own name, and attempted to negotiate it in that state to one Jesson, with whom he had had money transactions. Jesson said that he knew Bradshaw, and considered him as a good man, but that he should not be able to negotiate the note with Bolland's indorsement on it; on which Bolland said he could take his name off, and immediately another person in company began erasing the name. After he had scratched off all but the initial letter B, Bolland said don't scratch it all out; it may disfigure or cancel the note; I will think of some other name that begins with a B, and immediately made the name *Banks*. Jesson then took the note, and saying that he should be asked who James Banks was, Bolland said he was a publican of Rathbone-place. Jesson soon afterwards applied to Cardeneaux to discount the note, and obtained from him some money on the credit of it; and being pressed by Bolland shortly after for the amount of the note, he took him to Cardeneaux and introduced him as the owner of the note. Cardeneaux inquired who Banks was, and Bolland informed him he was a man of property who dealt largely in wines and spirits, and lived in Rathbone-place; on which Cardeneaux gave him the value in notes and cash. Cardeneaux never desired Bolland to indorse the bill, because Jesson had before told him that it was better that his name should not appear on it, as he had been a sheriff's officer, and the note would not pass properly with his name on it. Bradshaw and Pritchard having become bankrupts before the bill was payable, Cardeneaux applied to Bolland, who denied having discounted any bill with him, and said that his name was James Bolland, that he had never seen Cardeneaux before in his life, and that he had no bill with his indorsement on it; and when Cardeneaux insinuated that

Bolland's case, O. B. Feb. 1772, 1 Leach, 97.

One who had put his name as indorser on a true note, finding that his name discredited the note and prevented its negotiation, struck out all but the initials and made it another name, and then procured another to discount it, describing to him the supposed indorser as a person of credit (there being in truth no such person,) and when he was afterwards called on to make good the note on the failure of the drawer and payee, he denied having discounted the note or having any knowledge of or concern in the transaction, tho' the discounter then insinuated his knowledge of the whole: held forgery.

that he was acquainted with his having altered his name, he disregarded it. After the prisoner was taken up some person paid the 100*l.* to Cardeneaux in the name of James Banks; but no such person as James Banks of Rathbone-place appeared to exist. The jury found the prisoner guilty. After conviction and judgment of death the case was referred to the Judges: and the prisoner was afterwards ordered for execution, and suffered accordingly.

Ch. XIX. § 46. *In fictitious names or false character assumed.*

To these may be added the cases of Lockett and Abrahams which have been before mentioned; and the cases of Taft in 1777, of Taylor in 1779, and of Shepherd in 1781, hereafter noticed.

Ante, s. 38.

Post. s. 47.

§ 47.

Immaterial whether any additional credit be gained by the forgery, or whether the false name be assumed by the party himself for the occasion.

Further, It makes no difference whether the making of the false instrument or signature be really necessary to the advantage so fraudulently attempted to be obtained by the party, or gain him any additional credit; it is sufficient if it be made with such fraudulent intent.

Edward Taft was indicted for forging an indorsement on a bill of exchange in the name of John Williams. The bill, which was for 50*l.*, was drawn payable to the order of Messrs. Renwicke and Mee, by whom it was indorsed generally. It afterwards became the property of William Wheewall, out of whose pocket it was picked at Leicester races on the 16th of September 1776. The prisoner endeavoured to negotiate it the same night at Leicester, but without effect, though he offered a considerable premium. He then went to Market Harborough, where he bought a horse of the innkeeper, and offered him this bill to change, who carried it to a banker's in the town, whither the prisoner afterwards accompanied him, and the clerk offered to discount it if the prisoner would indorse it, which he was informed was the invariable rule of the house. The prisoner immediately indorsed it by the name of *John Williams*, which was not his name, and received the value of it in cash. He was found guilty; but his case was reserved for the opinion of the Judges; who on the 13th June 1777 were all of opinion that this was forgery within the statute. For though the fictitious signature was not necessary to his obtaining the money, and his intent in writing a false name was only to conceal through whose hands the bill had passed, yet it was a fraud

Taft's alias Tuft's case, Leicester Lent Ass. 1777, MS. Crown Cas. Res 97. & Serjt. Forster's MS. (1 Leach, 206. S. C.)

Forgery, where one unknown indorsed on a bill a different name as for his own.

Ch. XIX. § 46. a fraud both on the owner and on the person discounting it, as the one lost the chance of tracing it, and the other the benefit of a real indorser: and the forging a name either of a real or fictitious person with intent to defraud was in Lockett's case holden to be forgery.

In fictitious names or false characters assumed.

Ante, 940.

John Taylor's case, O. B. Oct. 1779, MS. Buller J. & Serjt. Forster's MS. (1 Leach, 255. S. C.)

Giving to the drawer of a bill of exchange a receipt in a false name as for the prisoner's own name, for the contents of the bill, which was indorsed in blank, is forgery; altho' no additional credit was thereby gained to the prisoner; being done fraudulently and to escape detection.

Vide S. C. post. s. 53.

Taylor was indicted for that he having in his possession a bill of exchange, viz.

"Tamworth, 2d Aug. 1779.

"Sir,

"One month after date please to pay to my order the "sum of £.20 val. reced &c.

"To Mr. Josh. Cuff, "Thos. Harper."
"Whitechapel, London."

forged, &c. a receipt and acquittance for the said sum of 20*l.* as follows: "*Recd W. Wilson;*" with intent to defraud the said J. C. Another count was laid with intent to defraud H. Sutton. The bill was indorsed in blank, and delivered to Sutton, out of whose possession the prisoner obtained it by some undue means, (how did not appear) and presented it for payment. The bill then wanted two or three days of becoming due; but the prisoner said he would give a trifle to adjust the difference, and accordingly gave Cuff 1*s.* for the discount. Cuff desired him to write a receipt on the back of the bill, which he did by writing the receipt in question in the fictitious name of Wilson. It was contended on behalf of the prisoner that this was not a receipt for money within the meaning of the act. That the receipt here was unnecessary, the possession of the bill being a sufficient discharge to the payer, and his discharge was not strengthened by the words written by the prisoner; consequently the act of the prisoner was of no effect. That he was not compellable to give any receipt. That he gained no additional credit by the name he assumed. That the writing on the back of the bill was in truth a mere memorandum, and did not operate as an acquittance against any person but the man himself who received it, who would be equally estopped by it as if he had written his own name. Mr. Justice Willes and Mr. Baron Eyre, before whom he was tried, were of opinion that the prisoner's case was within the letter and meaning of the statute; that this was a receipt evidently false; and the only question was, whether he intended

tended to defraud any person? The prisoner knew he had fraudulently acquired the possession of the bill; that it was necessary to elude any enquiry after him that he should conceal his name; and his intention to defraud the owner of the bill was manifest from his whole conduct. The prisoner was convicted: and upon reference afterwards to the Judges in Mich. term 1779, all of them (except Buller J. who doubted) were of opinion, that though the prisoner did not gain any additional credit by signing the name he put to the receipt, as the bill was not by the indorsement made payable to the person whose name was used, but indorsed in blank; yet still it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent a probability of tracing the person by whom the money was received.

Ch. XIX. § 47. *In fictitious names or false characters assumed.*

§ 48. *Personating the true man or fictitious character.*

The next consideration, and that which seems to have involved in it the greatest difficulty, is how far personating the true man or assuming a fictitious character at the time will affect the offence.

And first it may be proper to advert to certain principles which were laid down in the case of Elizabeth Dunn in 1765 after mentioned. 1st, That if a person give a note or other security as his own note or security, and the credit thereupon be personal to himself without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery: for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. But 2dly, that if a note be given in the name of another person either really existing or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery (*a*). 3dly, That the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the impostor and the party whose name is made use of were both strangers to him; for then he could not

Eliz. Dunn's case, 1765, 2 MS. Sum. 345. & post. s. 49.

(*a*) So if one use another name than his own for the purpose of fraud, and more easily eluding responsibility, Shepherd's case, post. 967.

Ch. XIX. § 48. *In fictitious names or false characters assumed.*

know that such impostor was not really the person whose name he assumed, and therefore the other would be equally deceived.

How far the first proposition above laid down is to be taken in its utmost latitude has been the subject of much difference of opinion, which I shall now proceed to consider. It is necessary however to pursue the subject by steps.

§ 49. *Assuming to be the real person in whose name forgery is committed.*

And first I take it to be clearly settled that in the case of forgery committed in the name of a person really existing, it matters not whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such: for in truth the credit in that case is not given to the impostor personally, without any relation to another, but to that other person whom he represents himself to be.

Eliz. Dunn's case, O. B. Sept. 1765, MS. Crown Cas. Res. 16. MS. Gould J. (1 Leach, 68. S. C.) *Forgery, by giving a note in the name of another as the prisoner's own, and assuming to be such other person. The indictment setting forth the tenor of the note and including the witness's name at the end, and also the words "Mary Wallace her mark;" held well; though the evidence proved that those additions were made after the prisoner had subscribed the note, but at the same time.*

Elizabeth Dunn was indicted for forging a promissory note for the payment of money, the tenor of which is as follows:

"London, 27th July 1765. I promise to pay to Mr. "Edwd Hooper the sum of *three* (omitting the word pounds) "13 shillings and 6d., or order, seven days after date, "value received by me

her

"Witness John Whettal." "Mary ⋈ Wallace, mark."

With intent to defraud Edward Hooper. The second count stated it to be with intent to defraud the person entitled to the wages due for the service of John Wallace deceased, a seaman on board the King's ship the Epreuve. In June 1765 the prisoner applied to Hooper at his office for receiving seamen's wages, calling herself Mary Wallace, and desired him to advance her money to pay the fees for the probate of her husband's will which was in the hands of a proctor. She returned soon after with the probate of the will of John Wallace, therein described to be a seaman on board the Epreuve; when Hooper required her to produce a certificate to prove that she was the Mary Wallace named in the will. In a few days having brought a certificate, she pressed him to lend her money on the credit of the wages due

Ch. XIX. § 40. *In fictitious names or false characters assumed.*

due to J. Wallace. Accordingly he let her have three guineas and a-half, and wrote the body of the promissory note in question, to which she subscribed her mark; after which his clerk attested it. And being asked what name he was to put to her mark, she answered you know my name, you may write Mary Wallace; which he did. It was proved clearly that her name was Elizabeth Dunn, and that the whole account was a fabrication. The Recorder directed the jury, that if they believed that the prisoner subscribed the note produced in a false name, either by a mark intended by her to express such false name, or by words at length, with intent to defraud Hooper; [for as to the second count he thought that could not be supported]; they should find her guilty; which they did accordingly. But judgment was respited on a doubt, whether as the note, though made by the prisoner in an assumed name and character, was her own note, made and offered as her own, and not as the note of another in contradistinction to herself, the offence amounted to forgery. In Michaelmas term 1765, present Lord Mansfield, Lord C. B. Parker, Clive J., Smythe B., Bathurst J., Wilmot J., Gould J., Perrott B., Yates J., and Aston J.; all but Aston J. were of opinion that this was a case within the words and intention of the stat. 2 Geo. 2. c. 25., and therefore that the prisoner was properly convicted.

Vide post. s. 58. for a previous objection.

(Absent Lord Camden and Adams B.)

So in a late case it was laid down that if a bill of exchange payable to A. or order get into the hands of another person of the same name with the payee; and such person, knowing that he is not the real payee in whose favour it was drawn, indorse it for the purpose of fraudulently possessing himself of the money, he is guilty of forgery.

Mead v. Young, M. 31 Geo. 3. 4 Term Rep. 28. *Vide* post. 965.

Mathias Parkes and Thomas Brown were indicted for forging and uttering the following promissory note.

Parkes' and Browne's case, O. B. Sept. 1796, cor. Rooke J. MS. Jud.

" No. 248. B. Ringhton, Salop, 20th April 1796.
" *I promise to pay to bearer on demand*, at Messrs. Down,
" Thornton, and Co. bankers, London, *the sum of Five*
" *Guineas for value received.*
" *For self and Co.*
" Five Guineas. Thos. Brown.
" Entered T. B."

Uttering a note as the note of another, though made in the prisoner's own name, is within the statutes against forgery. (2 Leach, 898. S. C.)

[The words in *italics* were printed in the note.]

With

Ch. XIX. § 49. *In fictitious names or false characters assumed.*

With intent to defraud Wm. Hulls. Other counts were laid with intent to defraud the bankers.

The prisoner Thomas Brown uttered the note to Hulls a shoemaker in part payment for a quantity of boots and shoes which he bought, under pretence that he was a Captain Brown of the 17th regiment, and going immediately to the West Indies. The prisoner Brown when he bargained for the articles at Hulls' shop desired Hulls to send his boy with him, and he would send back the money. Hulls however chose rather to go with the prisoner; and on their way Brown stated that his brother was agent to the 17th regiment, and would buy all the shoes Hulls had. When they came to a public house Brown invited Hulls in, saying, he should see his brother presently; and after some conversation about his brother's large fortune to the amount of 15,000*l.* which he had lodged in the hands of Messrs. Down and Co., he appeared to be disappointed at not seeing his brother, and said, I am sorry he does not come, I must give you my brother's draft. He then gave Hulls the note in question, who asked if it was on the money lodged with Down and Co. The prisoner said yes, and added, that his brother and he always paid in that manner on demand, for they wanted no credit. He then appointed Hulls to meet him in the afternoon at another place, where he would pay him the balance. The note was soon discovered to be a forgery, and Hulls could hear nothing more of the prisoner. It appeared that Parkes and Brown were connected together; and when Parkes was taken up more than forty of these five guinea notes in blank were found upon him, dated Rinton, Salop. A few of the same sort of notes were also found concealed under a vice board in a shop where the prisoner Brown was arrested, and which it was probable he had thrust there. The note in question was proved to be filled up in the hand-writing of Parkes. The name Thomas Brown was also in the hand-writing of Parkes. In Parkes' pocket-book was found a receipt under a cover addressed to Thomas Brown at the Compter (to which prison Brown was committed) for 21*l.* for four five guinea bills. Down and Co. had no such customer as Thomas Brown of Rinton in Shropshire, and there was no evidence that the prisoner Thomas Brown had any residence or connexion there. The jury found

found both guilty: and on being asked, declared that they thought Parkes signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing it was not so, with intent to defraud Hulls. Ch. XIX. § 49. *In fictitious names or false characters assumed.*

The counsel for the prisoner made the following objections to the conviction: 1st. That the name *Thomas Brown* was the real name of one of the prisoners. 2. That it was no forgery in Parkes to sign the name of Thomas Brown with his consent. 3. That if Parkes were not guilty of forgery, Brown could not be guilty of uttering the note knowing it to be forged. 4. That the subsequent misrepresentations of Brown ought not to affect Parkes, as there was no evidence that he was aware of the fraudulent circumstances under which Brown would utter the note. That misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making. Judgment was respited to take the opinion of the Judges on these points.

The case was argued in the Exchequer-chamber in 1797 before all the Judges; and at length the conviction was holden wrong as to Parkes (on a distinct ground hereafter stated). But as to Brown, all the Judges held the conviction right; for he uttered it as the note of another person and not as his own; and it being in the same name as his own could not make any difference. Post. s. 61.

At the December session following, Grose J., who delivered the opinion of the Judges, after stating the objections made, observed as to the 1st, that the definition of forgery was "the false making a note or other instrument with intent to defraud:" which might be done either by using the name of one who did not exist or of one who did exist, without his consent. That this was of the former description; being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist: and that the circumstance of its being made in the same name as his own could not make any difference, being uttered as the note of another and not his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, applied, there could be no consent given to sign the name. It was signed by the authority of a Thomas Brown, but *Vide* 2 Leach, 909. *Vide* ante, 966.

Ch. XIX. § 49. *In fictitious names or false characters assumed.*

but not of *the* Thomas Brown, for whose note it purported to be given. For the person in whose name the note was made was, according to the description of him in the note, then a resident at Ringhton in Salop; and it imported that he was a correspondent of Down, Thornton, and Co. and had money in their hands; and he was also represented to be the brother of the prisoner. But no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. 3dly, That the indictment did not charge that Brown uttered the note knowing it to have been forged *by Parkes*, but only knowing it to have been *forged:* and therefore let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it.

Hevey's case, O. B. Jan. 1782, ante, s. 5.

But where one merely assumed to be the person of a real indorser, though in concert with him, and for the purpose of fraud, it was holden to be no forgery, though a cheat; for there was no false making.

Personating others by statute.

This offence however of personating others for fraudulent purposes, which is often blended with forgery, is in many instances, made a substantive offence by the statute law, and will be treated of separately in the next chapter.

§ 50. *Assuming to be a supposed character in whose name forgery is committed.*

Secondly, I take it to be equally clear that forgery may be committed in the name of a supposed character who does not exist, but is assumed by the offender for the purpose of the fraud. In Dunn's case above mentioned it was agreed to be totally immaterial whether such a person as Mary Wallace existed or not. The character which the prisoner represented herself to be was different from her own, and she obtained the credit by being supposed to be a different person from what she really was. The cases also of Taft in 1777, and Taylor in 1779, stand on this ground. In both the offenders assumed to be the identical persons whose names they subscribed, though they obtained no additional credit on that account. It is true that in Taft's case the bankers would not discount the bill without the indorsement of the prisoner, to whom in that respect it may be said that some personal credit was given, however slight; yet his person being unknown, little or no stress can be laid on that.

Ante, 962.

Ante, 959, 960.

This

Ch. XIX. § 50.

In fictitious names or false characters assumed.

This matter seemed once to have been put out of doubt by the case of John Shepherd, who was indicted for forging an order for the payment of money with the name of H. Turner subscribed thereto, with intent to defraud James Elliott. The order was to pay John Atkins or bearer 6 guineas, and was directed to Brown, Collinson, and Co. The prisoner came to Elliott's shop, and after selecting several articles of silver, pulled out his purse as if going to pay for them, but said he had not cash enough about him, but had a draft upon a banker, which was the same thing as money, and would be paid when presented. Elliott looked at the draft, and seeing it was upon a house he knew, he took it, the sum being a small one, and the prisoner having a genteel appearance. He then desired Elliott to send him a pair of spurs, who took out his memorandum-book to take down the prisoner's direction, and supposing his name to be the same as was signed to the draft, (for he said he looked upon it as *his* draft,) he wrote down the name *H. Turner* as the prisoner's name. The prisoner looked over him as he wrote, and said he must add "jun. Noah's Row, Hampton Court." He then went away. The draft was refused payment by the bankers, no such person as H. Turner keeping cash with them. The prosecutor also inquired in Green-street from whence the draft was dated; but neither there nor at Hampton Court could he hear of any such person, nor could he hear of any such place as Noah's Row. The prisoner was found guilty; but judgment was respited upon a doubt whether as Elliott had proved that he gave credit to the prisoner, and not to the draft; having expressly said that he looked upon it to be *his* (the prisoner's) draft, though not written at the time he took it, the case amounted to forgery (*a*). In Michaelmas term 1781 all the Judges held that this was forgery and the conviction right; for it was a false instrument not drawn by any such person as it purported to be; and the using a fictitious name was only for the purpose of deceiving. And the case of Taylor in Michaelmas term 1779, that of Lockett in 1771, and that of Elizabeth Dunn in Michaelmas term 1765, were relied on.

Rex v. Shepherd, O.B. Sept. 1781, MS. Gould and Buller Js. MS. Crown Cas. Res. 117. (1 Leach, 265. S. C.)

Drawing a draft upon a banker in a fictitious name assumed by the party at the time for the purpose of fraud and to avoid detection, is forgery, though the credit were given to his person.

(*a*) Another objection was taken as to the form of the indictment. *Quod vide* ante, s. 40.

In

Ch. XIX. § 50. *In fictitious names or false characters assumed.*

In the abovementioned case of Shepherd the credit was indisputably given to the prisoner personally, the security tendered being considered as his alone: and it is agreed that the Judges were unanimous in adjudging the offence to amount to forgery. And yet I find it very difficult to distinguish this case upon principle from a subsequent one where the Judges were much divided in opinion: This was the case of

Aickles's case, O. B. Feb. 1787, MS. Gould and Buller Js. and MS. Jud. (2 Leach, 492. S. C. reports the case materially differently.)

John Henry Aickles, who was indicted for forging a promissory note as follows:

London, Dec. 18th, 1786.

"Three months after date I promise to pay to H. Byron, "Esq. or order £. 25 : 10 : 0 value received.

"£. 25 : 10 : 0 John Mason,

"No. 4. Argyle-street, Oxford Road."

With intent to defraud R. H. Gedge. There was a second count for uttering it knowing it to be forged.

Qu. *Where one had a month before taken the house where he lived in the name of* J. M. *and passed off a promissory note in that name, which he avowed to be his, dated some time before, but not payable till after the time of his trial; but the jury found that he assumed the name by which he was never before known, for the purpose of the fraud; whether this be forgery?*

It appeared that the note in question was on the 9th of January 1787 tendered by Byron to Gedge's shopman in payment for some linens that were shewn by him to Byron. Upon being asked who John Mason was, Byron described him as a gentleman of fortune with whom he was concerned in a coal-mine, living at No. 4. Argyle-street. The shopman declined leaving the goods with him, but promised to send them if upon inquiry the note were good. He immediately went to No. 4. Argyle-street, and inquired for Mr. Mason. The prisoner appeared, and said his name was John Mason, and that the note was drawn by him, and should be paid when due. It was proved that before the 9th of January the prisoner had taken the house No. 4. Argyle-street, in the name of John Mason, Esq., by which description also inquiry had been made by the person letting the house concerning his character at the British Coffee-house, which was a favourable one. It was then proved that he had always passed by the name of John Henry Aickles, and had been tried several times at the Old Bailey, and was known by that name since the year 1780 until the present time. Grose J. entertaining a doubt upon this evidence, directed the jury that the only ground on which they could convict the prisoner was, if they believed that this note was drawn by the prisoner in consequence of a concerted

certed scheme between him and Byron to defraud Gedge. That the prisoner had never gone by the name of John Mason before; and had assumed it for the purpose of this fraud: in which case they might find these facts, and he would state them to the Judges. Thereupon they found specially, that the prisoner intended to defraud Gedge, and assumed the name of Mason for the purpose of this fraud: that he had never gone by that name before: and that they disbelieved a witness on the part of the prisoner who had deposed that two years before he was inquired for and known by that name at the British Coffee-house. On this a verdict of guilty was taken by consent, subject to the opinion of the Judges on the case.

Ch. XIX. § 50. *In fictitious names or false characters assumed.*

This case was adjourned from Easter to Trinity term, but in the mean time Mr. Justice Ashhurst had given judgment at the O. B. (*a*) that it was not forgery; conceiving that the Judges had so decided. Many of them indeed seemed to entertain such an opinion, but several thought otherwise; and they never came to any final resolution on the matter.

MS. Gould and Buller Js. and MS. Jud.

It appears that the prisoner at this time was under sentence of transportation for a former offence, and had been tried for having been found at large without lawful cause before the expiration of the term. Upon some favourable circumstances appearing in his case he was acquitted of the latter charge, and remanded upon his former sentence.

Vide 2 Leach, 494.

Mr. Justice Gould (and other Judges coincided in opinion with him) thought the case amounted to forgery. There was an apparent design for fraud in general, and the jury were satisfied that the prisoner had assumed the name of Mason, which was not his name, nor had ever been used by him before, but always Aickles, with intent to defraud Gedge. He therefore made the note in the name of another as if his own, and clearly with an intent to defraud. Whether there existed a person of that name or not was immaterial; the felony consisted in the intent to defraud under the falsity. One might assume a feigned name, and make a draft in it, and yet innocently; as if he concealed himself to avoid arrest, and had appointed his friend on whom he drew to pay

MS. Gould J.

(*a*) This accounts for the statement given in the printed report, 2 Leach, 494.

Ch. XIX. § 50. *In fictitious names or false characters assumed.*

his bills; or giving notes took care to pay them when due. But the prisoner having no such intention, but on the contrary to defraud the party by making the note under such disguised name, by which after he left the place of concealment he could not be traced, the case amounted to forgery. There was no ground, he thought, to distinguish this from the common case where a draft is made in the name of a person who does not exist. It was in reality a deeper fraud, because the entity of such drawer would at once be disavowed at the place of his supposed residence; whereas in the present case of a note, there would be no circumstance to find out the maker when he quitted the place where he made the note.

MS. Buller J.

The Judges who inclined against the conviction went on the doubt whether to constitute forgery it was not necessary that the instrument should be made as the act of another, according to the definition of Lord Coke, whether that other existed or not. Whereas here the note was made as the prisoner's own, and avowed by him to be so: the credit was given to the person and not to the name; and the person and not the name was the material thing to be considered.

I cannot help suspecting that much of the difficulty in these cases arises from mistaking matters of fact for matters of law, and confounding the two together. It seems very difficult to distinguish the last case from Shepherd's before mentioned. It may be said that in Shepherd's case the prisoner had not been known by the name of H. Turner previous to the transaction; but merely assumed to be such a person at the instant for the purpose of the fraud; and that in truth no person was found to answer the description of the man he pretended to be. But if this matter be accurately considered, it must appear that the length of time during which the fictitious name has been adopted previous to the fact is only evidence of the intent, any more than the true description of the party's place of abode. If the party for other purposes have adopted another name by which he is known, and issue his signature accordingly, it may be a good reason with the jury for finding that he really intended at the time to issue it as his own instrument, and did not adopt the name then with a view to shift the future responsibility of it from himself under the colour of its being the act of another. But the finding of the jury in Aickles's case seems to have

have concluded that question; for they found that the prisoner assumed the name by which he had never been known before for the purpose of defrauding Gedge; unless indeed it may be said that such a finding does not necessarily include that the fraud was intended to be effected at the time by disowning the note afterwards as the act of another and not of himself. I do not stop to inquire whether this were a proper finding under all the circumstances, because it is not my intention to discuss a mere matter of evidence, or a deduction of fact. But assuming the conclusion of the jury to be right, the doubt is as applicable to the former case of Shepherd as to this of Aickles. Shepherd did no more than assume the name of H. Turner, by which he had never been known before, for the purpose of defrauding Elliott: Aickles did the like under the assumed name of Mason. It is possible therefore that the Judges who doubted in the latter case went upon the ground, that it did not appear from the evidence that Aickles made use of the name of Mason with a deceitful intention at the time of afterwards disowning the act in order to avoid the responsibility and escaping detection; but intended at the time to abide by the act as his own, and meet the consequences as well as he could. Where an impostor assumes the name and character of an existing person for such a purpose, the very act is decisive of such an intent. Where a particular character is assumed, though not existing in reality, as the executor of another who is in truth alive, the intent appears equally plain. But in the bare assumption of a fictitious name without any particular designation of character annexed to it, it may be more difficult upon occasion to fix this intention upon the party; because the act itself is of a more equivocal nature. Yet it cannot be conceived but that if a rogue knowing that he cannot obtain credit under his real name, assume another for the purpose of practising his imposition more easily, and under such assumed name negotiate a note, intending at the time to skulk from his responsibility under pretence that it was not his proper act; such a case would fall strictly under the definition of forgery; although he may, the better to colour his purpose, have assumed such fictitious name some little time previous.

I observe that in Aickles's case the note was dated the 18th of December 1786, and made payable three months after date,

Ch. XIX. § 50. *In fictitious names or false characters assumed.*

date. He was tried in February 1787, which was before the note became due. It does not appear but that he continued to pass by the same name of Mason to the time of his apprehension, as he had certainly done for some time (how long does not appear) before the 9th of January when the note was negotiated, and probably at the time it bore date: there was no opportunity of knowing whether he meant to disavow his act at the time of payment, which might have been evidence of his original intent; though such intent might certainly be collected from preceding and intermediate acts. The Judges who were disposed to acquit the prisoner of forgery probably thought that there was no evidence of any such intent. The intent however is strictly a matter of fact for the jury to pronounce upon under all the circumstances; and if properly left to them must conclude the question.

But to consider the matter truly, does not the very act of changing his name for such a fraudulent purpose carry in itself intrinsic evidence, that the party wishes to be thought a different person from what he really is, and consequently to pass off his act as the act of another. The instrument is false; and if the intention be to deceive and defraud, it falls expressly within the definition of forgery. And if it be part of that definition that the act should be done in the name of another, such a change of name may under circumstances furnish evidence of its having been so done. Though it may be doubted how such an amended definition will square with the case of a party antedating a deed of conveyance in his own name in order to give it a fraudulent priority over another, or with any cases of fraudulent alterations of instruments by the parties themselves who made them, in prejudice of the rights of other persons; which are all admitted to be forgeries.

Ante, s. 1.

§ 51.

VI. *What is a publishing or uttering.*

3 Inst. 171.

To pronounce or publish, says Lord Coke, is when one by words or writing pronounceth or publisheth the instrument to any other as true. It extends no doubt to every other manner of exhibiting it as a true instrument. But in order to constitute such an offence, it must be done with knowledge of the forgery; which knowledge may come by the relation of another

another as well as by the party's own observation. If, says Lord Coke, A. inform B. that such a deed is forged, and yet B. will publish it; if the deed be false, this is within the words (i. e. of stat. 5 Eliz.) "knowing the same to be forged." But such relation is not conclusive evidence of the fact of knowledge; it must be left to the jury upon the whole matter; for possibly there might be circumstances which might invalidate or weaken the credit of the person relating it, or of his relation itself, though it afterwards appear to be true. This is an offence distinct from, though connected with, the act of false making or forgery, as was before shewn; and therefore it is the common practice to indict persons who knowingly utter forged instruments as principals; and there may be accessaries before to such offence, as in the case of Soares and others stated in the ensuing section.

What a publishing or uttering.

1 Hawk. ch. 70. s. 3.
1 Hale, 685.
Ante, s. 4.
Vide the case of Parkes and Brown, ante, 963. and Reeves' case, 2 Leach, 492. 3 Inst. 171. and O'Brian's case, 2 Sess. Cas. 369.

VII. *What shall make a Person assisting or Accessary.*

§ 52.
Aiders and accessaries.

Lord Coke, speaking with great critical nicety, says, that *to cause* is to procure or counsel one to forge; *to consent* is to agree at the time of the procurement or counsel; and he in law is a procurer; *to assent* is to give his assent or agreement afterwards to the procurement or counsel of another. But this must be understood of an assent to the design of forging before the fact of the forgery committed; for according to Lord Hale, an assent afterwards makes not the party guilty or principal in the forgery; but it must be a precedent or concomitant assent. And in forgery it is laid down generally in the books that all are principals; and that whatever would make a man accessary before in felony, will make him a principal in forgery. But this must I think be understood of forgery at common law, and where it is considered only as a misdemeanor. For though Bothe's case where it was so resolved was an indictment for felony for the second offence upon the stat. 5 Eliz., yet that was not the principal point in judgment. Nor indeed does it appear how the question arose there, as none other than the prisoner appears to have been indicted. Therefore there seems no reason for taking this case out of the general rule, that when a statute makes a new felony, it incidentally and necessarily draws after it all

3 Inst. 169.

1 Hale, 684.

Bothe's case, Moor, 666. MS. Tracy, 145. 2 Hawk. ch. 29. s. 2. 1 Sid. 312. R. v. W. Hales and Kinnersley, O. B. Jan. 1729, cor. Ld. C. B. Pengelly, Reynolds J. and others, 9 St. Tr. 77. 92. and R. v. Robt. Hales, Hil. 2 Geo. 2. B. R. on a trial at bar, Masterman's Notes.

Ch. XIX. § 52. *Aiders and accessaries.*

all the concomitants of felony, namely, accessaries before and after. This reason seems to be confirmed by the following case, which has lately occurred:

Soares, Atkinson, and Brighton's case, Winchester Spring Assizes 1802, cor. Le Blanc J. MS. Jud.

Those who were privy to the uttering of a forged note, by previous concert with the utterer, but were not present at the fact of uttering, cannot be indicted as Principals, *but only as* Accessaries before.

Samuel Soares, William Atkinson, and John Brighton were tried at Winchester on an indictment charging them with feloniously uttering and publishing as true a certain false, forged, and counterfeit bank note for 5*l.*, knowing it to be forged, &c. with intent to defraud the governor and company of the Bank of England. There were the other usual counts for forging and for disposing of and putting away the note, with the like intent; and similar counts stating the intent to be to defraud the person to whom it was offered in payment. It was proved that Brighton offered the note in question in payment for a pair of gaiters at the shop of one Newland at Gosport, on Saturday the 1st of August 1801, about 5 o'clock in the afternoon. The other two prisoners *Soares and Atkinson were not with Brighton at the time he so offered the note in payment*, nor were they at the time *in Gosport*, but both of them were waiting *at Portsmouth* till Brighton should return to them, it having been *previously concerted between the three prisoners* that Brighton should go over the water from Portsmouth to Gosport for the purpose of passing the note, and when he had passed it, should return to join the other two prisoners at Portsmouth; they all three *knowing* that it was a forged note, and having been concerned together in putting off another note of the same sort, and in sharing among them the produce.

The counsel for the prisoners Soares and Atkinson objected on their behalf, that on the above evidence they were not guilty as charged by this indictment, not being present at the time the other prisoner uttered the note, nor so near as to be able to aid and assist him: that they could be charged only as *accessaries before* the fact. The jury found that the forged note was uttered by the prisoner Brighton by concert with the other two prisoners, and found them all three guilty. The prisoner Brighton was left for execution: but judgment was respited as to the other two; the counsel for the Bank desiring to have an opportunity of arguing it, if on consideration they should think the indictment maintainable against the two who were not present. On the report of this case to all the Judges in Easter term following, they had no doubt but that the two prisoners Soares and Atkinson were entitled

to

to an accquittal on this indictment charging them as principals, they not being present at the time of the uttering; and therefore required the prosecutor to state on what grounds the contrary was meant to be argued: and no suggestion of the kind being made, the two prisoners were recommended to a pardon.

The words of the stat. 5 Eliz. are *cause or assent to:* those of most of the subsequent statutes are *cause or procure*, or *act or assist in*, or *aid or assist in:* the Legislature seem to have varied the expression, in describing accessaries before, and aiders and abettors at the fact. *Vide* Fost. 136.

VIII. *Some general Rules touching the Manner in which the Offence is to be laid in the Indictment, and proved in Evidence.*

§ 53. *Indictment and evidence.* For other general matters *vide* the head of Indictments.

It is essentially necessary to an indictment for forgery that the instrument alleged to be forged should be set forth in words and figures; though there be no technical form of words for expressing that it is so set forth.

Mason's case, Northumberland Sum. Ass. 1592, MS. Buller J. and MS. Jud. *Indictment for publishing a forged instrument must set it forth in words and figures.* (*Vide* Lyon's case, 2 Leach, 696. S. P.)

Mr. Baron Thompson reported to the Judges that James Mason was tried and convicted before him, upon an indictment, which set forth that he, having in his custody and possession a certain inland bill of exchange, purporting to have been signed and subscribed with the name of one Robert Brown, and to bear date at, &c. and to be directed to certain persons by the name and description of E. H. W. and Co., thereby requiring them to pay to J. A. or order 91*l.* 19*s.* 6*d.* two months after date, value received, and to place it to the account of certain persons by the name and description of Messrs. J. T. A. and Co., as advertised by the said R. B., and purporting to have been indorsed by J. A., together with a false, forged and counterfeited acceptance of the same bill of exchange, written upon the same bill, and purporting to have been written by the said E. H. for and on behalf of himself and his said company, did feloniously utter and publish as true the said false, forged, and counterfeited acceptance, with intent to defraud one J. W.; he the said Defendant well knowing the said acceptance to be false, forged, and counterfeited. Judgment was respited on a doubt whether the indictment were sufficient, as it did not set forth the bill of exchange and the acceptance in their words and figures. The case was adjourned from Michaelmas term 1792 to Easter term 1793, and again to Trinity term

Ch. XIX. § 53. *Indictment and evidence.—Tenor of instrument.*

term following, when all the Judges agreed that the indictment was bad.

A similar determination was made in Lloyd's case (*a*) by all the Judges, upon an indictment for sending a threatening letter, which omitted to set out the letter itself.

Eliz. Dunn's case, ante, s. 49. MS. Crown Cas. Res. 16. *Indictment stating* tenor *of a note sustained by proof that the attestation of the witness and the words* M. W. her mark *were added after the prisoner's signature, though on the same occasion.*

In Elizabeth Dunn's case some doubt was at first entertained by the Recorder whether the indictment were proved; because it included the *attestation* of the witness, and the words "Mary Wallace her mark," in the tenor of the note charged to have been forged by the prisoner; the fact being that when the prisoner subscribed the note, those parts of it were not then written, and therefore she had forged a note differing in the tenor of it from that charged in the indictment. But Mr. Baron Perrott and Mr. Justice Aston, whom the Recorder consulted, being of opinion that in this respect the indictment was well proved, the Recorder directed the jury upon the principal charge.

Rex v. Powell, O.B. May 1771, 2 MS. Sum. 346. (2 Blac. Rep. 787. & 1 Leach, 90. S. C.) *Setting out the instrument* as follows, *sufficient, without naming the word* tenor. *It must be set out in* figures *as well as words.*

Robert Powell was indicted on the stat. 2 Geo. 2. for forging a certain receipt for money *as follows;* [setting forth the receipt in the words and figures] with intent to defraud Jos. Sykes. Other counts laid the intent to defraud Taylor Barrow. The fact was, that Powell had personated Barrow in the sale of 400*l.* East-India stock to Sykes, and had signed in his name the usual receipt upon the transfer. Several objections were made in arrest of judgment, which were argued before all the Judges at Serjeants' Inn on 30th of Nov. 1771. 1st, That the indictment should have set forth the receipt according to "the tenor following," which the words "as follows" do not import. But resolved by all the Judges that the words were to be taken the same as "according to the tenor following," or "in the words and figures following;" and that if the prosecutor had failed in evidence in proving the receipt verbatim as laid, it would have been a fatal variance. 2dly, It was objected that in the receipt some of the sums are in *figures*, which must not be in an indictment. But held that the receipt must be pursued exactly as it is, or it would be a variance. The prisoner was executed. It was laid similarly in Hart's case.

Vide S. C. post. s. 59. for another point. Smith's case, Salk. 342.

After these authorities I cannot but question Smith's case, E. 2 Ann., where it is said in the report, that where a deed with the mark of J. S. was forged, the indictment need not set out the mark.

(*a*) Lloyd's case, Trin. term 1767, 2 MS. Sum 329.

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Ch. XIX. § 53.
Indictment and evidence.—Tenor of instrument.

Yet even the setting out the very subject matter which has been forged will not in all cases be sufficient, if it do not purport on the face of it and without reference to some other subject matter to be the thing prohibited to be forged: but the purport and meaning of the forgery with relation to such other subject matter should be expressly averred to be the thing so prohibited. Thus in Hunter's case before mentioned, who was indicted for forging a receipt to an assignment of a certain sum in a navy bill the tenor of which receipt set forth in the indictment merely consisted of the signature of the party; it was holden insufficient, because the mere signing of such name unless connected with the previous matter did not purport on the face of it to be *a receipt:* but it ought to have been averred that such navy bill, &c. together with such signature did purport to be and was a receipt, &c. and that the prisoner did feloniously forge the same. And yet in Testick's case, where the tenor of the receipt set forth in the indictment was in these words, "Received the contents above by me," &c. it was holden sufficient without setting forth the bill to which it referred, or connecting the receipt by averment with such bill, but only averring it to be a receipt for money. But there by the very terms of the writing itself it purported to be a receipt for something, though not specifically for *money*, as it was averred to be, in order to bring it within the statute 2 Geo. 2. c. 25. Again, in Taylor's case, which was for forging a receipt for 20*l.* due upon a bill of exchange in these words, "Received, W. Wilson," the indictment set forth the bill for 20*l.* and then averred the forging of a receipt for the *said* sum of 20*l.*; but there was no averment that the writing forged together with the bill purported to be or was a receipt. But there also the forged writing in itself purported to be a receipt for something.

Hunter's case, ante, s. 86.

Testick's case, ante, s. 86.

Taylor's case; ante, s. 47.

§ 54.
Literal variance.

In setting forth however the tenor of an instrument a mere literal variance will not vitiate the indictment; as in the following case.

Hart's case, Worcester Lent Ass. 1776, MS, Gould J. and MS. Crown Cas. Res 57. (1 Leach, 172: S. C.)

Thomas Hart was indicted for forging a bill of exchange, which the indictment set forth as follows, (that is to say,)

"No. 215. £.42:0. Hull, April 24th, 1775.

"Two months after date please to pay Mr. Thos.

 "Jones

Ch. XIX. § 54. *Indictment and evidence. Variance in tenor.*

" Jones or order the sum of forty-two pounds value " *received*, and place the same to account, &c.

" George Prince.

" Messrs. Halliday and Co. Bankers, London."

Received *for* reicevd *held not a material variance, being still the same word. Vide* 2 Stra. 889.

The bill produced in evidence corresponded with that set forth in the indictment, except that it was written " value " reicevd." The prisoner was convicted; but judgment was respited upon the question whether this literal variance were material, the words sounding the same. And on the 7th of June 1776 all the Judges [De Grey C. J. and Willes J. absent] were of opinion that the variance was not material, as it did not change the word. And by Gould J., if the word had been written *receiv'd* or *recev'd*, the *e* in the one instance and the *i* in the other must have been necessarily understood. In Rex v. Bear, Carth. 408. the Court agreed that where an instrument is laid in the indictment according to the tenor, &c. the very *words* laid, and not the substance and effect of them, must be proved. The question then is as to the *word* and not the *letter*, unless by *addition*, *omission*, or *alteration* it becomes another word; as in the Queen v. Drake, which proceeded upon its being a different word, *nor*, for *not*. And Powys J. says, in the report of the same case in Holt Rep. 350. that he did not mark this to be so small a variance of a letter as if it happened *in false spelling* or *abbreviations*, which possibly might not hurt.

(R. v. Bear (*a*).)

(Reg. v. Drake,) Salk. 661.

§ 55. *Where true instrument in part altered.*

If any part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument.

Dawson's case, Mich. 3 Geo. 1. Ld. King's MS. cited from Serjt. Forster's MS. (1 Stra. 19. S.C.)

The prisoner altered the figure of 2 in a bank note to 5 (220*l.* to 520*l.*); and ten Judges agreed that this was forging and counterfeiting a bank note; forgery being the alteration of a deed or writing in a material part to the prejudice of another, as well as when the whole deed or writing is forged; and that 3 Inst. 171, 172. was not law in this respect; for non assumpsit might be pleaded to such a note.

(*a*) In Lord Holt's MS. note of this case, which is very fully reported, it is stated generally, that laying an indictment for a libel juxta *tenorem* sequentem imports that the indictment sets forth the *words* of the libel, and not merely the *effect* of it. The indictment there set forth the libel *juxta tenorem et ad effectum sequentem.*

John

Ch. XIX. § 55. *Indictment and evidence.—Alteration of true bill.*

John Teague was tried on an indictment charging him with feloniously, &c. *making, forging, and counterfeiting* a certain bill of exchange as follows, viz. " No. 2-621. £. 50. " Brecon, 24th June 1799. On demand pay to the bearer " £. 50. value received. For Wilkins, Jefferys, Wilkins, " and Williams. (Signed) Walter Jefferies," (and addressed to) " Messrs. Miles, Vaughan, and Co., Bankers, " Bristol;" with intent to defraud W. W. &c. against the statute. There was a second count for uttering the same knowing it to be forged. Two other similar counts stated the intent to be to defraud T. Powell. It appeared that the bill was drawn and issued by Walter Jefferys, one of the partners of the house, for 10*l. only*, on a *sixteen-penny* stamp, which is the proper stamp for *promissory notes* of 10*l.* which are to be re-issued after they shall have been paid. That this bill of exchange had been re-issued three times as a 10*l.* bill. That it had been altered by changing the 10*l.* into 50*l.* in the part of the bill where the sum is expressed in figures, as also in the part where it is expressed in letters; and so altered had been passed by the prisoner to Thomas Powell. The jury found the prisoner guilty of uttering it, knowing it to be forged: but judgment was respited on two objections made by the prisoner's counsel; first, that this being a forgery by *altering* the sum in a *genuine* bill, it should have been so stated in the indictment; the stat. 7 Geo. 2. c. 22. making it a distinct offence *to alter*, viz. " If any person " shall falsely make, *alter*, forge or counterfeit, or utter or " publish as true any *false*, *altered*, forged or counterfeited " acceptance of any bill of exchange," &c. Secondly, that the act permitting the re-issuing of *notes* after the same shall have been paid relates only to *promissory notes*, but this is *a bill of exchange*, and could not be legally re-issued without a fresh stamp; and having been re-issued three times before it was altered, it was not a valid bill for 10*l.* at the time it was altered to 50*l.*, and therefore it was not that species of forgery which consists in altering a true and valid bill.

Teague's case, Hereford Sum. Ass. 1802, cor. Le Blanc J. MS. Jud.

One who alters a true instrument may be indicted capitally on the stat. 7 Geo. 2. c. 22. for forging the instrument (viz. a bill of exchange); though the statute has the word alter *as well as* forge; *for every alteration of a true instrument makes it a forgery of the whole: and it is no less a forgery though the instrument altered (a 10l. bill of exchange) had been re-issued before three times, without being re-stamped; and was therefore not available in a civil action at the time of such alteration.*

At a conference of the Judges in Michaelmas term following, they all held the conviction right. For that the question as to the *alteration* of the bill was governed by the case of the King v. Dawson abovementioned: and every alteration of a true instrument for such a purpose made it when altered a

forgery

Ch. XIX. § 55. *Indictment and evidence.—Alteration of true bill.*

forgery of the whole instrument. That as to the objection on the stamp, it had been decided that the stamp acts had no relation to the question of forgery: but that supposing the instrument forged to be such on the face of it as would be valid provided it had a proper stamp, the offence was complete.

Vide the cases before cited, p. 955, &c.

It has been more usual however hitherto to lay forgeries of this sort, as was done in Harrison's case before, and in Elseworth's case after mentioned, by stating the particular alteration, at least in one count.

Ante, s. 36.

Post. p. 986.

§ 56. *Purport.*

Though it be doubtless sufficient to charge that the Defendant forged such an instrument, naming it, and setting forth the tenor; yet certainly the laying it to be *a paper writing*, &c. *purporting* to be such an instrument (as the statute on which the indictment is framed describes) is good; and indeed in strictness of language there may be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument.

Birch and Martin's case, O. B. Sept. 1771, 2 Blac. Rep. 790. 2 MS. Sum. 347. *Indictment for forging* a paper writing, purporting to be the will *of another, is good.*

Birch and Martin were indicted and convicted of publishing, "as a true will, a certain false, forged and counterfeited "*paper writing, purporting to be the last will* of Sir Andrew "Chadwick," &c.; the tenor of which was set out. The matter was debated before all the Judges at Serjeant's Inn, on the 30th of November 1771, when it was objected, 1st, that it should have been laid that they forged a certain *will*, and not *a paper writing purporting*, &c.; for the statute says, "shall forge *a will*." But a variety of precedents being produced in which it was laid in that manner, the Judges held it to be good either way. 2dly, It was objected that it was not stated that it purported to be attested by three witnesses: but to this it was answered and holden, that as the will was set forth *in hæc verba*, and the three names appeared as witnesses, that was sufficient. 3dly, That it was only laid, "they knowing it to be forged," &c.; whereas it should have been that "they and each of them knowing," &c. sed non allocatur. And the prisoners were executed.

Post. 985.

But in all cases the word *purport* imports what appears *on the face of the instrument;* for want of attending to which many indictments have been set aside.

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Ch. XIX. § 56.
Indictment and evidence. Purport.

In Jones's case in 1779, the instrument was laid in some counts to be *a paper writing purporting to be a bank note:* but the Court were of opinion, that as it did not purport on the face of it to be a bank note, the counts could not be supported; and that the representation of the prisoner at the time, who passed it off as such, could not vary the purport of the instrument itself.

Jones's case, ante, p. 883.

Jeremiah Reading was indicted, for that he having in his custody and possession a certain bill of exchange with the name John White thereunto subscribed, *purporting* to be signed by one John White, and *to be directed to one John King, by the name and description of one John Ring Esq.*, Berkley-street, Portman-square, London, for the payment of the sum of 80*l.* to him the said Defendant, or order, forty days after date, &c., which said bill of exchange is to the tenor and effect following:

Reading's case, O.B. Sept. 1793, MS. Buller J. and MS. Jud. Ante, 952. (2 Leach, 672. S. C.)

Indictment charging that Defendant being possessed of a bill of exchange, purporting *to be directed to* J. King *by the name, &c. of* J. Ring, *forged the acceptance of the said* J. King, *is bad; for* Ring *does not* purport *to be* King.

" Bristol, Feb. 21st, 1792.

" Forty days after date pay to Mr. Jeremiah Reading, or " order, the sum of £.80. for value received, and place it " to the account of " John White.

" To John Ring Esq. Berkley-st., Portman-square, Lond."

he the said Defendant on, &c. did falsely make, forge and counterfeit, &c. upon the back of the said bill of exchange an acceptance in writing, *purporting to be the acceptance of the said John King*, of the said bill of exchange, which said false, forged and counterfeited acceptance is to the tenor and effect following, viz. " John King, A." with intent to defraud W. D. &c. There was a second count for uttering the same.

It was proved that the prisoner negotiated the bill, which was directed to John *Ring*, and accepted on the back of it by John *King;* and that he told Mr. Dalby the prosecutor who advanced money upon it, that Mr. King was a gentleman living in Berkley-street, Portman-square, and a man of opulence. It appeared in evidence that there was no person of that name living there. The prisoner was found guilty; but Mr. Justice Grose reserved the case for the opinion of the Judges, whether the bill of exchange were properly described in the indictment, and whether the offence laid in it were proved. In Hilary term 1794 judgment was arrested, because

Ch. XIX. § 56. *Indictment and evidence. Purport.*

because the bill did not in fact *purport* to be drawn on J. *King*, as laid in the indictment.

Buller J. in delivering the opinion of the Judges afterwards at the O. B. observed, that the indictment as drawn was absurd and repugnant in itself; for the name and description of one person or thing could not purport to be another. That the drawer of the indictment was led into the blunder by not recollecting that the bill, though drawn on John Ring, might have been accepted by John King; as if he had accepted it for the honour of the drawer, &c. But he observed, that the judgment being arrested for the informality of the record, the prisoner might be again indicted for the offence he had been guilty of.

O. B. Feb. 1794, *vide* 2 Leach, 674.

Gillchrist's case, O. B. 1795, MS. Buller J. and MS. Jud. (2 Leach, 753. S. C.)

The word purport *imports what appears on the face of the instrument. Therefore indictment for forging an order for payment of money, stating that it* purported *to be directed to* A. B. C. *by the names of* A.C.D. *and setting forth the tenor as directed to* A.C.D., *held bad.*

And lastly, in the case of one Anselmo Robinson Gillchrist, who was indicted for forging "*a paper writing, purporting to be an order for payment of money, dated 11th September* 1794, with the name Thos. Exon thereunto subscribed, *purporting* to have been signed by Thos. Exon, clerk, and *to be directed to George Lord Kinnard*, Wm. Moreland, and Thos. Hammersley of, &c. bankers and partners, *by the name and description of Messrs. Ranson, Moreland, and Hammersley*, for the payment of the sum of 10*l.* &c.;" the tenor of which said false writing, &c. is as follows, viz.

"Messrs. Ranson, Moreland, and Hammersley, please
"to pay to Mr. Brooks, or bearer, the sum of Ten
"Pounds, for
"Sept. 11th, 1794. Thos. Exon."

with intent to defraud the said Geo. Ld. K. &c. There was a second count for uttering it; and other counts charging an intent to defraud other persons.

An objection was made in arrest of judgment, that the direction of the bill was improperly described in the indictment; and the above case of Reading was relied on. And upon a conference of the Judges in Easter term 1795, it was resolved by ten Judges present, that the judgment should be arrested accordingly, because the word *purport* imports what appears on the face of the instrument. It means the *apparent* and not the *legal* import. And that this could not purport to be directed to Lord Kinnard, because his name did not appear on the face of the bill. And Jones's case and Reading's case were referred to.

Buller

Buller J., who delivered their opinion at the O. B. in July following, observed, that old cases had given rise to much learning and argument on the words *purport* and *tenor*, and on the necessity of using one or other of those terms; but that no judicial determination that he was aware of had ever required that the *purport* and *tenor* should both be stated in any case whatever. That the purport of an instrument meant the substance of it, as it appeared on the face of the instrument to every eye which read it. The tenor of an instrument meant the exact copy of it; and where that was stated the purport of it must necessarily appear. That the forms of indictments for forgery had differed in different instances, and of late years had become more complicated than they used to be, and in his opinion very improperly so. In one, which he had seen, it was stated that the prisoner forged a false writing in the names of J. S. &c. *bearing the form of a warrant of attorney, which said writing follows in these words, &c.* If an indictment stated merely that the prisoner forged a paper writing to the tenor and effect following, and set out the instrument verbatim, which on the face of it appeared to be a bill of exchange or other instrument within the statute; as then advised, he saw no objection to it: and at all events if it stated that he forged a paper writing in the name of T. E., purporting to be a bill of exchange, to the tenor and effect following, and then set out the bill; he thought it would be good and unexceptionable: for the words "purporting to be a bill of exchange," could only be necessary for the purpose of shewing which of the instruments mentioned in the statute the prisoner had forged: and in order to do that it could not be necessary under the word *purport* to state all the contents of the bill. The bill itself shewed all those things, and the law had required that an exact copy of the bill should be stated upon the indictment, in order that the Court might see upon the record that it was in form such an instrument as fell within the words and meaning of the statute. That the blunder in this case had arisen from the circumstance that Lord Kinnard and Messrs. Moreland and Hammersley had carried on the business of bankers under the firm of Messrs. Ranson, Moreland, and Hammersley: and the person who drew this indictment, forgetting that it was wholly immaterial whether

MS. Buller J.

Ante, 989.

Ch. XIX. § 56. *Indictment and evidence. Purport.*

ther such a firm as Ranson, Moreland, and Hammersley ever existed, or who were the persons who constituted that firm, had taken great pains to shew that the bill drawn on Ranson, Moreland, and Hammersley, was drawn on Lord Kinnaird, Moreland, and Hammersley: and in order to do that, he had averred that the bill *purported* to be drawn on Lord Kinnaird, Moreland, and Hammersley. But it purported that alone which appeared on the face of the bill: and upon the face of the bill Lord Kinnaird's name was not mentioned; and therefore it did not purport to be drawn on him. The consequence was, that the indictment was repugnant and defective, and the prisoner was discharged from it. But as the objection went only to the form of the indictment and not to the merits of the case, he was remanded to prison till the end of the sessions, that the prosecutor might be at liberty to prefer another and a better indictment against him if he thought fit.

Edsall's case, Southampton Sp. Ass. 1798, cor. Thomson B. MS. Jud. *ad idem.*

Again, in Edsall's case, who was convicted on an indictment which charged him with forging a certain paper writing, *purporting* to be an inland bill of exchange, and to be drawn by one C. W. Wright, bearing date, Winchester, 14th Nov. 1796, and to be *directed* to *Richard Down, Henry Thornton, John Freer, and John Cornwall the younger*, bankers, London, by the name and description of Messrs. Down, Thornton, and Co. bankers, London, requiring them ten days after date to pay to Mr. Wm. Simmons or order 8*l.* 10*s.* &c. and then setting out the tenor by which the bill appeared, as the fact really was, to be directed "to *Messrs. Down*, "*Thornton, and Co.*, bankers, London." The Judges, upon reference to them, held the indictment bad, upon the authority of Gillchrist's case; though Buller J. disapproved much of that determination; which however he admitted could not be distinguished from the present case (*a*).

Trin. Term, 1798.

Isaac

(*a*) *Vide* Reeve's case, O. B. Jan. 1798, 2 Leach, 933. the consideration of which was pending before the Judges when the last-mentioned case was reserved for their opinion. One of the objections there was that the indictment charged that the prisoner forged a certain scrip receipt, "with "the name C. Olier thereunto subscribed, *purporting* to have been signed "by one *Christopher* Olier," &c. whereas C. Olier did not necessarily purport to be *Christopher* Olier, but might be Charles, &c. The objection was for the present over-ruled by the Court, (consisting of Heath and Lawrence Js. and Thomson B.) thinking there was a shade of distinction between this and Gillchrist's case; there being no such absolute repugnance here

Ch. XIX. § 56.
Indictment and evidence. Purport.

But where Isaac Carter was indicted for forging and knowingly uttering a bill of exchange, described in the indictment to be "a certain bill of exchange requiring certain persons by "the name and description of Messrs. Down, &c. 20 days after date to pay to the order of R. Thomson the sum of "315*l.* value received, *and signed by Henry Hutchinson* for "T., G., T., and H. Hutchinson, which bill of exchange so "falsely made and counterfeited is as follows, (setting out "the bill) &c. with intent to defraud G. Hutchinson," &c. On proof that the signature to the bill "*Henry Hutchinson*" was a forgery, it was objected that the indictment averring it to have been *signed by him*, (and not merely that it *purported* to have been signed by him), which was a substantial allegation, was disproved: and so the Judges held on reference to them, after conviction.

Carter's case, York Sum. Ass. 1800, cor. Graham B. MS. Jud.

An indictment for forging a bill of exchange, stating it to be signed *by* H. H., *instead of* purporting *only to be so signed, the signature itself being a forgery, is bad.*

§ 57.
What technical words at common law.

It is usual to charge that the party *falsely* forged and counterfeited, &c.; but it is said to be enough to allege only that he *forged* or *counterfeited*(*a*), without adding *falsely*, which is sufficiently implied in either of those terms; particularly in the verb to *forge*, which as was first mentioned is always taken in an evil sense in our law. In like manner as it was adjudged in Warbell's case, 2 Rol. Abr. 82. that where a fact laid in the indictment appears plainly to be unlawful, there is no need to say *illicitè*.

Savage's case, Sty. 12.

Ante, s. 1.

§ 58.
Indictment should bring the offence within the words of a statute.

It is a general rule applicable to this as to other offences, that an indictment on a statute must in general set forth the charge in the very words of the statute describing the offence; for equivalent words are not sufficient. Besides which, as was before shewn, the instrument itself must be set forth, that it may appear to the Court to be what it is alleged to be.

2 Hawk. ch. 25. s. 110.

1 Hawk. ch. 70. s. 26.

3 Inst. 13.

But a superfluous description does not appear to be objectionable; as in John Dunnett's case, who was charged

Dunnett's case, O. B. Dec. 1792, MS. Buller J. and MS Jud.

here upon the face of the indictment as in that case; but they reserved the point for the opinion of the Judges. But it does not appear what that opinion was; for there were other objections taken to the conviction; and finally the prisoner was capitally convicted on another indictment pending for a similar offence.

(*a*) The Latin words formerly in use were *fabricavit* et *contrafecit*. *Vide* Mariot's case, 2 Lev. 221. and Dawson's case, 1 Stra. 19.

Ch. XIX. § 58. *Indictment and evidence, on statutes.*

with uttering and publishing as true "a certain false, "forged and counterfeited *bond and writing obligatory,*" purporting to have been signed by P. R. &c. as follows: "Know all men, that we P. R., W. G., and W. L., of L., "are held and firmly bound to J. Dunnett of, &c. in 2510*l.* "to be paid to the said J. D., &c. by us, &c.; therefore we "are firmly bounden to the said J. D. in the said sum, &c." dated 20th November 1790, &c., signed P. R., &c., and sealed and delivered, &c. knowing it to be forged, &c. The indictment was founded on the stat. 2 Geo. 2. c. 25. s. 1. which has both descriptions, *bond*, and *writing obligatory:* and the objection taken was, that as the act of parliament in enumerating the several instruments, the forgery of which it prohibits, mentions both; the indictment ought to have described the offence more particularly either as a forgery of the one or the other, and should not have called it *a bond and writing obligatory;* but in the present case should have described the instrument as a *writing obligatory*, and not as a *bond;* having neither a defeasance nor penalty annexed to it: and that although a bond were a writing obligatory, yet that the converse did not hold; therefore they were not convertible terms. After conviction, judgment was respited to take the opinion of the Judges on this point; who in Easter term 1793 held that the instrument was well described, and the conviction proper.

Indictment for forging a bond, laying it to be a bond AND writing obligatory, *is good upon the stat.* 22 Geo. 2. c. 25., *though both terms be used in the statute; a bond being a writing obligatory, though the converse do not hold generally.*

Elsworth's case, York Lent Ass. 1780, cor. Willes J. MS. Buller J. and MS. Crown Cas. Res.

Indictment on st. 2 Geo. 2. c. 25. *charging that the prisoner feloniously* altered *a bill of exchange*, by falsely making, forging, & adding *a cipher, &c. held good; though the words of the statute are "if "any person shall "falsely make, "or forge, counterfeit," &c.*

An indictment stated, that an inland bill of exchange was drawn on the 23d of November, 20 Geo. 3. by Thomas Leach, and directed to Messrs. Mildred and Walker, bankers, London, requiring them to pay to J. Harrock or order 8*l.* two months after date, for value received (setting out the tenor of the bill). That Thomas Elsworth (the prisoner) on, &c. the said bill of exchange did feloniously *alter* and cause to be altered *by falsely making, forging, and adding* a cipher 0, to the letter and figure £.8 in the said bill, and also by *falsely making, forging, and adding* the letter *y* to the word *eight* in the said bill mentioned, whereby the letter and figure £.8 before written in the said bill became £.80, and the said word *eight* before written in the said bill became *eighty;* by reason and means of which said forgeries and additions the said bill of exchange, so drawn as aforesaid for eight pounds, became and purported to be a bill of exchange for

for eighty pounds; with intent to defraud Henry Garforth, &c. The second count stated, that certain persons unknown altered the bill (in the manner stated in the first count), and that the Defendant on, &c. had in his custody and possession the said false, forged, and altered bill, and did feloniously utter and publish the same as true, with the like intent, knowing it to be forged, &c.

Ch. XIX. § 58. *Indictment and evidence, on statutes.*

The prisoner being convicted, it was moved in arrest of judgment, that as this was an indictment on the stat. 2 Geo. 2. c. 25. s. 1. the words of it must be strictly pursued in charging the forgery; which words were, "if any "person shall falsely make, forge, or counterfeit;" (whereas the forgery alleged was, that persons unknown did alter and cause to be altered, *by falsely making, forging, and adding* the cipher 0 to the letter and figure £.8 &c.); that it ought to have been charged that they *falsely made, forged, and counterfeited* the said bill of exchange by falsely altering and adding, &c.; and that if the forgery itself were not alleged with sufficient precision, the charge of uttering and publishing was also defective; because the allegation was, that he feloniously uttered and published the *said* false bill of exchange with reference to the preceding charge of forgery. That several of the statutes against forgery had the word *alter* in them, *viz.* 8 & 9 W. 3. c. 20. *altering* or rasing the indorsement on any bank bill. 9 Ann. c. 21. s. 57. forging, counterfeiting, or *altering* a bond of the South-sea company. 11 Geo. 1. c. 9. s. 6. *altering*, forging, or counterfeiting any bank bill; and stat. 15 Geo. 2. c. 13. forging, counterfeiting, or *altering* any bank bill of exchange. But that the word *alter* was not used in the statute on which this indictment was founded. That in framing indictments on statutes the constant practice had been in the charging part to follow strictly the words of the acts, and so were the precedents. The counsel for the Crown admitted that this indictment was rather informally drawn; but contended that there was sufficient alleged for the conviction of the prisoner on the second count. That the false and fraudulent alteration of a writing to the prejudice of another man's right, was a sufficient description of a forgery at common law; and that the uttering or publishing, of which the prisoner was found guilty, was charged in the precise words of the statute,

viz.

Ch. XIX. § 58. *Indictment and evidence, on statutes.*

viz. that he feloniously uttered and published a false, forged, altered, and counterfeited, &c. bill of exchange as true, knowing the same to be false, &c. Execution being respited by Willes J. in order to take the opinion of the Judges; on the 12th of April 1780 all held that the indictment was good; and the offence sufficiently proved upon the second count: for there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering by falsely making and forging, or for feloniously making and forging by falsely altering, &c.

Vide S. C. post. 989. for another objection.

Crutchfield's case, ante, 895.

So in Crutchfield's case, who was indicted for forging a stamp on foreign muslins; the indictment, stating the duty to be chargeable *for, on, and in respect of* foreign muslin, was holden good; though the words of the statute in the clause imposing the duty are *for and upon*, in other clauses *for*, in others *on*, in others *upon*.

Stocker's case, Salk. 342. 5 Mod 137. Walcot's case, Holt's Rep. 345.

But where the indictment stated that the Defendant forged *or* caused to be forged a bill of lading, it was holden bad for uncertainty.

§ 59. *Intent to defraud*, ante, 854.

The intent to defraud, which has been touched upon before, must be stated in the indictment, and pointed at the particular person or persons against whom it is meditated; and the proof must tally with such averment, otherwise the prisoner will be entitled to an acquittal.

Rex v. Harrison, O. B. 1777, MS. Buller J. (1 Leach, 215. S. C.) Ante, s. 36. S.C. on another point.

Harrison was indicted for forging a receipt upon the stat. 7 Geo. 2. which makes it felony to forge such receipt with intent to defraud *any person*. Some of the counts in the indictment laid the offence to be with intent to defraud the London Assurance Company and the Bank of England alternately. It was objected, that a company or corporation was not a person: and that the Legislature had so decided by passing the stat. 31 Geo. 2. c. 22. s. 78. which after reciting that doubts had arisen whether the word *person* in the stat. 2 Geo. 2. c. 25. extended to corporations or companies, enacted, that they who were convicted of the offences in that statute should have the same punishment if they committed them against a company or corporation as if against any person: but it did not mention the offences comprised in the stat. 7 Geo. 2. The Court reserved this point for the opinion of all the Judges, who decided in favour of the prisoner;

Indictment and evidence.

Intent to defraud.

Manner of defrauding.

soner; and he was discharged. Shortly after the stat. 18 Geo. 3. c. 18. was passed to remedy this defect.

But the indictment need not state the manner in which the party is to be defrauded, for that is matter of evidence.

In Powell's case one of the objections was, that it was not averred that T. Barrow, whose name appeared to be signed to the forged receipt, meant Taylor Barrow, with intent to defraud whom the forgery was laid in one of the counts. That the manner in which the forged receipt of stock was to operate in prejudice of Mr. Barrow ought to have been averred in the indictment; which should have stated that Taylor Barrow was the proprietor of so much stock; that the prisoner personated him in the sale and transfer, &c., and transferred it to such a person in his name, &c.; and it was not sufficient merely to state that the forgery was committed with intent to defraud T. B. generally. But it was holden sufficient by the Judges that the offence was described in the words of the act: and that whether it were or were not meant to defraud Taylor Barrow was matter of evidence, which the jury had found. Besides there was a second count, wherein it was laid with intent to defraud one Sykes. If therefore there were no such person as Taylor Barrow, or if he had no stock, yet as the receipt had in form the constituent parts of a receipt for the transfer of East India stock, that was sufficient.

Powell's case, ante, s. 53.

So in Elsworth's case before mentioned, Buller J. upon the conference started a similar objection, that it was not stated that the bill was uttered or tendered to the persons whom it was laid the prisoner meant to defraud; and therefore that it did not appear to the Court on the face of the indictment that the transaction was such as those persons could be defrauded by it; which always was the case where the name of a drawer, acceptor, or indorser is forged. But all the other Judges held that the indictment was good also in this respect; for it was sufficient to pursue the words of the act which constitute the offence, and it was matter of evidence whether the prisoner intended to defraud the persons named by tendering the bill in payment to them, or how otherwise.

Elsworth's case, ante, s. 58.

In indictment for uttering and publishing a forged bill of exchange it need not be averred that the bill was tendered to the party, with intent to defraud whom the offence is laid to have been committed, nor in what other manner he could be defrauded, though his name did not appear on the bill; for that is matter of evidence.

As

Ch. XIX. § 60. *Indictment and evidence. Persons defrauded.*

As to the manner of describing the persons against whom the forgery is intended to operate, the following cases have occurred.

§ 60. *Description of persons defrauded, &c.*

Henry Lovell was indicted for forging an order for payment of money, purporting, as the indictment described, to be an order under the hand of Henry Harvey Aston, and directed to *Messrs. Drummond and Company*, Charing-cross, by the name of Mr. Drummond, Charing-cross, by which said order, &c. *the said Messrs. Drummond and Company* were required to pay the bearer, or order, the sum of £.10 : 10; which said order, &c. is as follows, viz.

R. v. Lovell, O. B. Sept. 1782, MS. Gould and Buller Js. MS. Crown Cas. Res. and MS. Jud. (1 Leach, 282. S. C.) *An indictment stating that a forged order was directed to* Messrs. Drummond and Company, *by the name of, &c. is sufficiently certain.*

" Mr. Drummond, Charing-cross. 25th August 1782.

" Please to pay the bearer, or order, on demand £.10 : 10

" and place it to account, per me, H. H. Aston."

with intent to defraud H. H. Aston. The second count was for uttering the said order, and laid like the first. The third and fourth counts were like the preceding ones, but laid with intent to defraud Robert Drummond and the other partners in the house by name. There were other counts, laid as the first in manner above specified. After conviction a motion was made in arrest of judgment, that the indictment charged the note to be drawn on *Drummond and Company* by the name of *Mr. Drummond, Charing-cross*, whereas the names of the respective partners ought to have been mentioned, instead of giving the short description of *Drummond and Company:* and it was alleged that on search of precedents none could be found of an indictment drawn in this form. At a conference of the Judges on 6th Nov. 1782, they all held the indictment good. The question was, whether any person or persons were described by the words, " *Messrs. Drummond and Company*," or whether they were totally unintelligible, and a description of nobody. The Judges said they must understand them as every body else did, namely, as meaning the partners in the partnership in the banking house, it being a sensible and certain pointing out of the persons intended by the draft; and it was not necessary to state by name who those partners were in that part of the indictment. Gould J. said, that to require the particularizing of all the partners would be of dangerous consequence to such prosecutions; some of them might not be known. And it also seemed to Buller J. and other Judges

Ch. XIX. § 60.
Indictment and evidence.
Persons defrauded.

Judges that if the words "Messrs. Drummond and Com- "pany, Charing-cross, by the name of," had been omitted, and the indictment had only stated, according to the fact, that the bill was directed to Mr. Drummond, Charing-cross, it would have been sufficient: and as the indictment was framed, the only question was, whether Drummond and Company were meant by the prisoner, which was established by the verdict.

Jones and Palmer's case, O.B. 1785, cor. Eyre B.
1 Leach, 405.
Indictment for forging an indenture of apprenticeship and a receipt for money, with intent to defraud A. B. C., &c. the stewards of the feast of the Sons of the Clergy sustained by proof that the stewards had the disposition of a charitable fund raised by voluntary contribution, out of which the apprentice fee sought to be obtained by the forgery was to be taken.
Vide Thomas's case, ante, s. 36.

Mary Jones and Henry Palmer were indicted for forging an indenture of apprenticeship, and also a receipt for money, with intent to defraud A. B., &c. *the stewards of the feast of the sons of the clergy.* The charitable fund of the sons of the clergy is raised by voluntary contributions, and allotted by the secretary equally among all the stewards to be disposed of by them to the widows and children of deceased clergymen, according to their discretion. The prisoner Jones was a clergyman's widow, and pretending by means of these indentures and the receipt indorsed thereon that she had placed her son as an apprentice, she obtained in concert with the other prisoner an order from one of the stewards on the treasurer of the society for 20*l.* as an apprentice fee. The forgeries were clearly proved, and the prisoners found guilty. But it was submitted that the offence amounted only to a misdemeanor at common law, and that this was not such a species of property as fell within any of the acts relating to forgery. But by Eyre B. forgery is the false making of an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons. The statutes 31 Geo. 2. c. 22. s. 78. and the stat. 18 Geo. 3. c. 18. were made to prevent any doubt whether the aggregate members of a corporation, which is a body politic, were included under the words, "*person or persons;*" for where there is an incorporation, the money becomes the property of the whole body, and not of the individual members who compose it. But in the present case the several stewards were the absolute owners of their respective shares of the fund: it was their money, put into their hands upon a trust, and if they had sunk it improperly or paid it wrongfully, they would perhaps be answerable: but unquestionably it was their money as against all the world, except the subscribers.

It

Ch. XIX. § 61. *Indictment and evidence.*

It seldom happens that direct proof can be given of the very act of forgery; and where the forger is not the utterer, a difficulty has sometimes occurred as to what shall be deemed sufficient evidence of the fact of forging *within the county laid*, a difficulty which does not occur upon the issue of non assumpsit, in an action upon such an instrument, the action being transitory.

§ 61. *Proof of the act of forgery within the county.*

Parkes' and Brown's case, ante, s. 49. MS. Jud. *Finding a note forged by* A. *in the hands of* B. *who uttered it in the county of* M., *in which also* A. *was, though not present at the fact of the uttering, is no evidence of the note having been forged by* A. in that county; *though other notes of the same kind were there found upon him.*

Parkes and Brown, whose case was before noted for another point, were indicted, the first for forging, the other for uttering a forged promissory note for five guineas. There was no doubt of Parkes having forged the note in the same name as the other prisoner, and with his concurrence, but pretended by the latter when he uttered it to be the note of his brother, whom he represented as a man of fortune in a lucrative employment. The venue was laid in Middlesex, but the only evidence which was offered to shew that the forgery was committed there, was that Brown, between whom and Parkes an intimate connexion was proved to exist, had uttered it in Middlesex, (Parkes not being present at the time, nor for aught appeared cognizant of the fact); and that upwards of forty of the same sort of five guinea notes in blank, without any signature, were found upon Parkes in the same county; all of which notes as well as the one in question were dated "Ringhton, Salop;" and also a receipt was found upon Parkes under cover, addressed to Brown, for 21*l.* for 4 five guinea bills. Both the prisoners were convicted. But after argument in the Exchequer-chamber a majority of the Judges held the conviction wrong as to Parkes; there being no evidence that the forgery was committed by him *in Middlesex*, where it was laid. For they thought that the bare fact of the note being uttered there by the other prisoner, taking him even to be an accomplice, was no evidence of the forgery itself having been committed there. But some of the Judges were not satisfied with this opinion, thinking that the fact of finding the forged instrument in the county, in which also it appeared that the forger himself was, was evidence, in the absence of other proof, of the fact of the forgery having been there committed. The majority agreed that it was a question of evidence for the jury; but thought that there was no proof in this case to warrant the conclusion.

IX. *As*

IX. *As to the Competency of Witnesses to the Fact of the Forgery*

§ 62. *Witnesses.*

There is some difficulty upon this point, not in ascertaining the practice which has long prevailed; for that has been uniform in rejecting every witness who is interested, at the time of his examination, in setting aside the instrument alleged to be forged, upon which if genuine he would be liable to be sued; but in reconciling that practice in all cases with the principle laid down in Abrahams v. Bunn, Bent v. Baker, Smith v. Prager, and that class of cases, by which it is now settled as a general rule that unless the witness is to derive an immediate advantage from the verdict, if favourable, or can give it in evidence on his own behalf in any other suit to which he is a party, the objection of interest only goes to his credit and not to his competency. The rules of evidence are said to be the same in criminal as in civil cases; and as the object must be the same in both, to arrive at truth, there is nothing in reason to establish a difference, unless where the necessity of the case furnishes an exception in admitting the party injured to give evidence against an offender from whose conviction he is to derive some advantage to himself, ne maleficia remaneant impunita. That reason however does not hold in the present case for the admissibility of the witness whose hand-writing has been forged; for although he must necessarily know with more certainty than any other, whether the instrument be or be not of his own making; yet as in many instances he has a direct interest in setting it aside, and as the fact of his hand-writing may be ascertained with reasonable certainty by others, the common and primary rule of law prevails, that where such interest appears the party is incompetent to depose to any fact which goes to disprove the genuineness of the instrument.

Watt's case, Hard. 332. pl. 7. 3 Salk. 172. pl. 4. *Vi.* 2 MS. Sum. 346

4 Burr. 2255. 3 Term Rep. 27. 308. & 7 Term Rep. 60.

Attorney-General v. Le Merchant, Exch. Dec. 1772. 2 Term Rep. 201. n.

If it were even admitted that this practice is in some instances not altogether reconcileable with the rule before mentioned, as laid down in Bent and Baker and the other cases, it might be sufficient to say that the long continuance and universality of such practice has now fully established the case of forgery as an exception to that rule. But it is not so

Ch. XIX. § 62. *Witnesses.*

clear that the rejection of the witness in this case furnishes such an exception. For without entering into the question how far a *conviction* in a criminal case, founded on disinterested testimony, would be evidence, at least primâ facie, against the convict, or those claiming under him in a civil suit upon the same instrument, where the fact of the forgery was directly in issue, (a point upon which the distinctions taken by Lord C. B. Gilbert and his reasonings thereon, as well as the opinions of others, are deserving of great consideration before it is ruled in the nagative; (*a*)) yet in all cases of felony, at least, where the forgery is of such sort that the party accused might, if the writing were genuine, have his remedy thereon against the witness, or the latter lose his remedy against him, it is clear that the witness has a direct interest in the conviction; because the security itself as well as the remedy is lost to the offender by the attainder and forfeiture (*b*); and it cannot be presumed that the Crown, at whose instance the conviction was procured on the very ground of the falsity of the writing, would be so inconsistent with itself as to attempt to set it up again, even if it were not legally estopped by its own act on record (*c*). And even in other cases of felony, where the forgery was committed for the benefit of a third party, an interest still exists in the witness, who is bound by the writing, if genuine, to procure a conviction: for independent of the discredit thereby thrown on the instrument, which is insisted on by some as a sufficient reason in itself (*d*) for excluding such testimony; although the conviction would in that case be no legal evidence to avoid the instrument in a civil action by or against such third person, to whom the rule of res inter alios acta would justly apply; yet the difficulty of suing thereon or setting it up again would at least be increased from the known usual practice of the court to impound instruments found by the verdict of a jury to be forged: and the difficulty of proof also to the third party interested in the civil action might possibly be enhanced by the conviction of the fabricator for forgery, which being a species of the crimen falsi renders him in all instances an incompetent witness.

(*a*) Gilb. L. of Evidence, 25. &c. (last edit.), and 2 Bac. Abr. 614. &c. and *vide* Bull. N. P. 245. Watt's case, Hardr. 332. Per Holt C J. at Guildhall, 14 Geo. 3. and S. P. 5 Ann. in C. B. 3 Com. Dig. 281. Strickland v. Ward, Winchester Sum. Ass. 1767, cor. Yates J. cited from his MS. in 7 Term Rep. 633. n. 6 Mod. 186. S. P., and Cook v. Shell, 5 Term R. 256. and 12 Vin. Abr. 95.

(*b*) *Vide* 2 Hawk. ch. 49. s. 9, 10.

(*c*) *Vide* Co. Lit. 352. *a* & *b.* and 2 Inst. 39.

(*d*) *Vide* 2 Hawk. ch. 46. s. 24. and 2 MS. Sum. 346. *Sed vide* R. v. Bray, Rep. temp. Hardw. 358. and Smith v. Prager, 7 Term Rep. 63.

Vide Co. Lit. 6. *b.*

§ 63. *Interested witnesses not admissible.*

But on whatever grounds the interest of the party whose hand is forged may be supposed to rest, if he be in fact interested

terested in setting aside the instrument, supposing it genuine, either as against the prisoner or any other, all the cases establish that his evidence is, to the point of the forgery at least, inadmissible. I shall begin with some of the earliest. Ch. XIX. § 63. *Witnesses.*

In Watt's case, upon an information for forgery, it was holden that no person who could have any advantage by the conviction could be a witness for the King. Watt's case, Hardr. 331, 2 3 Salk. 172.

In Russel's case, who was indicted on the stat. 2 Geo. 2. c. 25. for forging a certain acquittance and receipt with intent to defraud Roger Gately a solicitor, (the receipt containing several items of account between them for money disbursed, &c.), Mr. Gately was ruled to be no witness to prove the forgery of his name subscribed. Russel's case, O. B. Feb. 1737, cor. Page J. and Carter B. 1 Leach, 10.

In Peter Caffy's case, upon an indictment for forging the indorsement of "Joseph Gardiner" upon a promissory note made payable to him or order, held per Raymond C. J., Denton J., and Hale B., that Gardiner could not be a witness to prove that the hand-writing was not his, being a party interested. Caffy's case, O. B. Oct. 1729, Denton's MS. cited in Serjt. Forster's MS.

In Rhodes's case, upon an indictment for forging a letter of attorney to transfer stock in the name of Heysham the proprietor, Mr. Justice Fortescue rejected Heysham as a witness to prove the forgery. Rhodes's case, 2 Stra. 728.

There is another case in print of one Robert Rhodes, before Mr. Baron Reynolds, which seems to have carried the rejection of a witness on the ground of interest a great way. The prisoner was tried for the forgery of a will of one Thompson, *dated* 1736, in which he was named executor; and in order to disprove the hand-writing of Thompson, one Carter was called, who claimed as executor under a subsequent will dated 1737. His competency was objected to, because he had an interest in establishing the latter and invalidating the former will. To this it was answered, and apparently with some weight, that he had no manner of interest in overturning the first will; for whether it were a true or a false one the last was equally valid, if sufficient in itself: and its sufficiency could in no event depend upon the result of the impending trial, allowing all the weight to the verdict which it might be supposed to have; but it must stand or fall upon its own ground. The witness R. v. Robt. Rhodes, O. B. 1742, cor. Reynolds B. 1 Leach, 31.

was

Ch. XIX. § 63. *Witnesses.*

was however rejected; but for what reason does not appear Perhaps it would be difficult to shew how far even the credit of such a witness was affected.

Vide Bull. N. P. 284.

And if the executor be a bare trustee, claiming no beneficial interest under the will, I conceive that the same rule which governs in civil cases would prevail in this.

§ 64. *Incompetency as to other evidence of the fact of forgery.*

Incompetency arising from interest in the event of the verdict, where it really exists, extends to preclude the party from giving other evidence as well as that of negativing the hand-writing, which tends to prove the fact of the forgery. Therefore the executor of a person, whose promissory note had been forged, was by Mr. Baron Adams rejected as a witness to prove what the prisoner said to him when he tendered him the note for payment.

Rex v. Geo. Bunting, Thetford, March 1767, Serjt. Forster's MS.

§ 65. *Proof of identity or non existence of person whose name is forged.*

It being essential to prove the identity or non-existence of the person whose name is charged to be forged, so far as to shew that it is not the hand-writing of the same person which it purports to be; it has been often in question by whom, and in what manner, such fact can be proved.

Sponsonby's case, O. B. July 1784, 1 Leach, 374.

John Sponsonby was indicted for forging an indorsement in the name of William Pearce on a bill of exchange, drawn by Richard Davis in favour of William Pearce on Crofts and Co. for four guineas. The report states that William Pearce, the supposed payee, was an intimate acquaintance of Davis the drawer, and had received a letter of advice, signifying that such a bill had been remitted to him, and desiring him as an act of friendship to pay the produce to one Coles in discharge of a debt which Davis owed him. The bill never having come into Pearce's hands, and he having no demand on Davis for the amount, it was agreed that he was a competent witness to prove that the indorsement was not his hand-writing. But it being also necessary to shew that he was the identical William Pearce to whom the bill was made payable; and as Davis the drawer, whose testimony was considered as the best evidence of the fact, was not present to attest it; the letter of advice which Pearce had received from him was holden insufficient for the purpose; and Pearce's testimony to shew the hand-writing to be forged was finally rejected: for though it might not be his hand-

writing,

writing, yet it might be the hand-writing of another Wm. Pearce to whom the bill might be payable. Ch. XIX. § 65. *Witnesses.*

Without considering any other point of evidence which occurred in this case, it may be doubted whether the fact of this Wm. Pearce being an intimate acquaintance and correspondent of the drawer, and no evidence being given of the existence of any other Wm. Pearce, to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee: and as far as that goes his testimony would rather press against his interest than for it; though it is otherwise as to the falsification of the indorsement. For taking him to be the Wm. Pearce to whom the bill was made payable, if the indorsement had been genuine he would have been liable to an action at the suit of Davis; not having applied the money according to his order. It seems therefore that he had no manner of interest, but rather the contrary in proving himself to be the real payee; but that he had an interest or rather a bias in proving that the indorsement was not his hand-writing. *Vide* **Parr's case,** post.

Vide Birt and others, Assignees of Glover v. Kershaw, 2 East's R. 458.

And in a subsequent case in the same book it is reported that Isaac Hart, a proprietor of stock, whose person and signature were assumed by the prisoner Parr in endeavouring to receive the dividend due to him, was examined as a witness to prove his identity, by testifying the amount of the stock he had at the Bank, and that the sum for which the prisoner had obtained the dividend warrant was the exact sum due to him at the time. But he was not examined to the falsity of the signature. Parr's case, O.B. 1787, 2 Leach, 487—491. Post. tit. *False personating* S. C. for another point.

James Downes was tried upon several charges of forging, and uttering a bill of exchange in the name of Andrew Helme, with intent to defraud one Anthony; and also of forging and publishing an indorsement in the name of John Sowerby on a bill of exchange purporting to have been drawn by the said A. Helme, dated 12th May 1789, and payable two months after date to the order of the said John Sowerby for £.14 : 6 : 6, with the like intent. Some letters of the prisoner's, written after he was apprehended, were produced, from whence it clearly appeared that the name of the drawer A. Helme was forged. One of these letters directed to Andrew Helme, the prisoner's uncle, containing an application from the prisoner to him to beg his uncle to acknowledge Downes's case, Lancaster Sum. Ass. 1789, cor. Wilson J. MS. Buller J. *The drawer's name appearing to be forged on a bill as well as the indorser's, it is no objection that the drawer was not called to prove upon whom the bill was drawn, there being two of the name at the place; and it may be shewn by other evidence who the prisoner meant by*

Ch. XIX. § 65. *Witnesses.*

the person whose name he forged as the payee and indorser.

acknowledge that it was his signature, in order to save him (the prisoner) from his impending fate, and promising to save his uncle harmless from the payment. In the same manner it appeared from the letters that the John Sowerby whose indorsement was intended to be counterfeited by the prisoner, was the son of another person of the same name in Liverpool. Anthony Bennett proved that the prisoner owing him some money offered him the bill in question, with the indorsement thereon: and that on questioning him, the prisoner said that the drawer Andrew Helme was a gentleman of credit at Liverpool, *and the indorser a cheesemonger there*, who had received the bill in payment for cheeses; and that he might depend on it, it was a good bill. Whereupon he took it; and afterwards paid it away, and fourteen days after it became due it was returned to him as good for nothing. John Sowerby the father was then called, who swore that the indorsement was not his hand-writing: that he had lived 36 years in Liverpool, and knew no other person of the same name there, either a cheesemonger or otherwise, except his son, who had left him about four months before, and afterwards carried on the same business of a cheesemonger in Dean-street. That his son had failed, and was lately gone to Jamaica. That the indorsement was not at all like his son's hand-writing, and he did not believe it to be his. That the prisoner and his son were acquainted, and the prisoner had bought corks of him. Another witness also proved that the indorsement was not like the hand-writing of the son, and he did not believe it to be his.

It was objected on the part of the prisoner that A. Helme the drawer of the bill had not been called to prove what John Sowerby it was in whose favour the bill was drawn, as he best knew that fact, and therefore that his was the best evidence, and such as the law requires. The evidence given was however left to the jury by Mr. Justice Wilson, and the prisoner was thereupon found guilty. But judgment was respited to take the opinion of the Judges on the objection taken. In Michaelmas term 1789 all the Judges held the conviction proper; and the following reasons were assigned by the learned Judge by whom sentence was afterwards passed. " The objection supposed that there was a genuine

(Buller J.)

genuine drawer of the bill, who it was insisted ought to have been called as a witness to prove what John Sowerby it was in whose favour the bill was drawn. But to this there were two answers. First, it was apparent that the name of the drawer as well as that of the indorser was forged by the prisoner, for he acknowledged as much in the letter under his own hand to his uncle A. Helme the supposed drawer. And if no real drawer existed, and the objection were allowed, it would be to excuse one forgery because another had been committed. But 2dly, the prisoner himself had ascertained who was intended by the John Sowerby whose indorsement was forged; for when he negotiated the bill he represented him to be a cheesemonger at Liverpool; and by another letter of the prisoner's it was clear that he meant Sowerby the son; for therein he requested his uncle to go to Sowerby's mother, and desire her to say nothing about it, whether he had any concern or not, or whether he indorsed it or not. Then it being proved that the indorsement was not the hand-writing of Sowerby the son, the evidence of the forgery was full and complete, and the conviction right."

§ 66. *Competency of witness whose hand-writing is forged where he has no interest.*

But if the party whose hand-writing is forged have no interest in invalidating the instrument in question, there is no doubt but that he is a competent witness: and some cases appear to go the length of establishing, that being the best he is the only witness, if living, to prove the forgery: but that is not confirmed by the current of authorities to such an extent; though the testimony of such an one, when disinterested, must doubtless be the most satisfactory of any on the question of his own hand-writing.

Usher's case, O. B. 1759, cor. Lord Mansfield C. J. Smythe B. and Wilmot J. 1 Leach, 57. *One who paid a forged bill on account of the supposed acceptor, and debited his account with the payment, being afterwards satisfied of the for-*

On an indictment against Thomas Usher for forging an acceptance to a bill of exchange, purporting to be drawn on Anthony Merry, a merchant in London, by Thomas Quilty and Co. at Malaga, and to be accepted by Mr. Merry, payable at Sir Charles Asgill's and Co. The prisoner was proved to have received the money for the bill at the house of Asgill and Co., who then believing it to be genuine had charged Mr. Merry's account with the payment; but being afterwards fully persuaded that it was a forgery, they had given Mr. Merry's account credit for the same sum. Mr. Merry himself

Ch. XIX. § 66. *Witnesses.*

himself was called to prove the acceptance in his name to be forged, which was objected to on behalf of the prisoner without a release from Asgill and Co. The Court however admitted his testimony, on the ground that having been allowed the money in account with Asgill's house, with a knowledge of all the circumstances, there could be no demand upon him for the amount whether the prisoner were convicted or acquitted, and therefore he was not interested in the event.

gery, and having credited the account with the same sum, thereby rendered the acceptor a competent witness to prove the acceptance a forgery without a release to him.

So in Testick's case before mentioned, the person in whose name the receipt was forged, having been paid the money by the debtor in fraud of whom the forgery was committed, was admitted as a witness.

Testick's case, 1774, ante, s. 36. 12 Mod. 338. S. P. Wells's case, at Oxford, Bull. Ni. Pr. 289. and *vide* Lord C. J. Treby's opinion in Dean's case, E. 8 W. 3. 12 Vin. Abr. 23.

Again, where one was indicted for forging a receipt, and the person whose name was forged had before recovered the money from the prisoner, he was admitted as a witness by Lord C. J. Willes to prove the forgery.

§ 67.

In the case of Captain Smith, who was tried for uttering a forged receipt of one George Maughan a butcher, at the island of Grenada, upon a bill for butcher's meat supplied to the ship of which the prisoner was captain; the charge was for altering the figures in the quantity of meat, and in the sums they amounted to, with intent to charge one Trinder, the owner of the ship, with larger disbursements than the captain had really laid out. And to prove that these alterations were forgeries, and not the hand-writing of Maughan, one Greenwood his partner was produced, as one who was acquainted with Maughan's hand. Sir Fletcher Norton, for the prisoner, objected, that Maughan himself ought to be produced, or some reason given why he could not. The prosecutor alleged that he was dead, but on the single hearsay of Greenwood, who left him alive about two years and a half before. Gould and Yates Justices were of opinion that such evidence was no sufficient proof of Maughan's death; and that without that proof no evidence but *his* could in this case be admitted of the forgery: for Maughan's testimony would certainly be the best, as he could say positively whether the hand-writing were his or not; but Greenwood could only speak from opinion: and it was an established rule, that in all cases the best evidence be given which the case will admit of, and less than that was

Captain Smith's case, O. B. 16th Jan. 1768. 2 MS. Sum. 503.

One whose voucher is forged for the purpose of imposing on a third person, with whom he had no dealing, and to whom he could in no event be responsible, is the proper witness to prove the forgery of his own hand-writing.

was never to be received, if it appeared that a better might have been had. And in this case there was not the same reason for not producing Maughan which commonly occurred in prosecutions for forgeries, which were generally by the party himself whose hand was forged, and were pointed at an intention to defraud that party: and in those cases there was certainly no necessity that the person whose hand-writing was forged should himself appear to prove the forgery; but the fact might be proved by others who were acquainted with his hand. That the reason was, because in such prosecutions the party himself, whose hand-writing was forged, would be no competent witness, being interested in the question: and therefore the testimony of those who were acquainted with his hand was really the best evidence which the case would admit of. As, therefore, the party himself could not be examined if he were present, it was a sufficient reason for not producing him at all on the part of the prosecution. But in the present case Maughan had no degree of interest at stake: whatever was the true amount of the bill he had been paid it, and had no demand at all subsisting. The question was only between the prisoner and Trinder; whether the prisoner had over charged his disbursements, and had produced false vouchers in his accounts with Trinder: and upon such a question Maughan might certainly have been a competent witness, and he certainly could give the best and most satisfactory evidence, whether the alterations in his bill were corrections of his own, or were forged by some other hand. Accordingly the evidence of Greenwood was rejected, and the prisoner was acquitted.

In Coogan's case, Gibson, the supposed testator, proved the will to be a forgery. So it was in Stirling's case, where Mrs. Shuter appeared in court, and gave evidence of the forgery.

Coogan's case, O. B. 1787, MS. Buller J. ante, s. 43. (2 Leach, 503. S. C.)

Stirling's case, O. B. 1773, ante, s. 43. and Murphy's case. ibid.

§ 68.

Newland was indicted for forging a bank note, signed "Wm. Lander. For the Govr. and Company of the Bank "of England." Lander, who was a cashier of the Bank, properly authorised to subscribe such notes with his own name, for the governor and company, and who had given security to them for the faithful performance of this duty,

Rex v. Abraham Newland, O. B. Feb. 1784, 1 Leach, 350.

Ch. XIX. § 68. *Witnesses.*

The cashier of the Bank who signs notes for the Governor and Company, is a competent witness to prove his hand-writing a forgery.

was called as a witness to prove the forgery of the bank note, and that the name "*Wm. Lander*" subscribed thereto was not his hand-writing. His competency was objected to, upon the interest which he was alleged to have in the event of the prosecution: for upon a supposition that he had signed the note, without carrying it to the account of the Bank, he would be liable as well to a criminal prosecution for the fraud, as to a civil action on his security bonds, &c. To this it was answered on the part of the prosecution, that the witness had no direct interest in the question: for whether the note were genuine or not, he could never be responsible for the payment of it. That the very objection was founded upon the presumption of a breach of trust, which could not be entertained upon any legal principle; and therefore an interest could not be inferred from such a presumption. Mr. Baron Perryn and Mr. Serjeant Adair, Recorder, admitted the witness, upon the ground that he was in no event responsible for the payment of the note in question. They said that the interest must be apparent upon the face of the instrument itself, or arise immediately from the nature of the transaction, or from the acknowledgment of the party himself. That in the present case, unless criminality were presumed, no interest could be inferred, and such a presumption was repugnant to law.

Hughes's case, Exeter Sp. Ass. 1802.

M'Guire's case, Lancaster Sp. Ass. 1801, cor. Chambre J. MS. Jud.

But in Hughes' case, on a similar prosecution, Le Blanc J. held that the hand-writing of the cashier of the Bank might be disproved by any other person who was acquainted with his hand-writing. And in the case of Dennis M'Guire, a conviction for forging a bank note was established on reference to the Judges, without the aid of the cashier's testimony to disprove his hand-writing, the forgery of which was established by other evidence, which shewed that the instrument was false in all its parts, in the texture of the paper, the water mark, the engraving, the ink, and the written date of the year, which was 1798, though the printed date under the Britannia was 1799; being altogether proved to be such as the Bank never made or issued.

§ 69. *Release, &c.*

But whatever might have been the interest of the party in the transaction at first, there is no doubt but if he be divested of such interest by release, payment, or otherwise, at

at the time he is ready to be sworn, it is no objection to his competency, whatever it may be, under certain circumstances to his credit. Therefore a release from the holder of a promissory note to the supposed drawer, in whose name it was forged, there being no other name on the note to whom the drawer could be liable, made him a competent witness to prove the forgery of his hand-writing upon an indictment against the prisoner, who had passed it off to such holder without any indorsement. In Dr. Dodd's case, the Earl of Chesterfield, the supposed obligor of the forged bond, was admitted to disprove his signature, on producing a release from Fletcher, the supposed obligee.

Ch. XIX. § 69. *Witnesses.*

Akehurst's case, Sussex Sum. Ass. 1776, cor. Ld. Mansfield C. J. 1 Leach, 178.

Dr. Dodd's case, O. B. Feb. 1777, 1 Leach, 187.

X. *Judgment and its Consequences.* § 70.

In a variety of instances, the forgery of particular instruments has been made felony by statute, for the most part excluding the benefit of clergy: these have been severally mentioned under their appropriate heads. In all other cases the offence must be taken at this day to rest in misdemeanor, punishable at common law by fine, imprisonment, and such other corporal punishment as the Court in their discretion shall award; and by statute also with certain punishments of the same kind in particular instances, which have also been pointed out.

Vide ante, s. 1. 1 Hawk. ch. 70. s. 1. 4 Blac. Com. 247. 3 Bac. Abr. 277.

One of the consequences of any judgment for this offence is an incapacity to be a witness, until restored to competency by the king's pardon, under the great seal, &c.

5 Com. Dig. Testmoigne, A. 3, 4. Co. Lit. 6. *b.*

Also by stat. 12 Geo. 1. c. 29. in case persons convicted of forgery shall afterwards practise as attornies, solicitors, or law agents, the Court where the suit or action is brought shall, on complaint, examine the matter summarily, and cause the offender to be transported for seven years.

12 Geo. 1. c. 29. *Attornies, &c. practising after conviction for forgery to be transported.*

CHAP. XX.

FALSELY PERSONATING ANOTHER.

Assimilated to Forgery. § 1.
1. *Falsely personating the Proprietors of Stock* classed with Forgery, and made a capital Felony by Statute. *ib.*
What *an Endeavour to receive* the Money of Stockholders by false personating, under the several Statutes. - - - - § 2.
The real Proprietor *a Witness* to prove his holding the Stock. *ib.*
2. *Personating Seamen*, &c. *and Out-Pensioners of Greenwich Hospital*, made capital Felonies by Statutes. § 3.
Such personating must be in order to receive Wages, &c. due, or supposed to due. *ib.*
It must be a personating of an existing Person entitled, or who primâ facie might be entitled to such Wages, &c. - - - - § 4.
3. *Acknowledging any Fine, Recovery, Deed enrolled, Statute, Recognizance, Bail, or Judgment in another's Name*, without his Assent, Felony by Stat. 21 Jac. 1. c. 26. - - - - § 5.
Extended to bail before Commissioners or Justices of Assize by Stat. 4 & 5 W. & M. c. 4. *ib.*
Construction thereof. *ib.*
4. In all other Cases, though done for fraudulent Purpose, not more than *Misdemeanor at common Law*, grounded on Conspiracy and Cheating, or under Circumstances affecting the Public. - § 6.

§ 1. *Falsely personating another.*

Falsely personating proprietors of public stocks classed with forgery.

THIS offence, committed for the purpose of cheating another, by imposing on him a false name or character, for the purpose either of gaining a new credit or preventing

venting detection, is in its nature nearly allied to forgery, with which it is usually accompanied, to give it efficacy. They have been accordingly classed together by the legislature in various instances, which have been already mentioned, with respect to personating the proprietors of government stocks, or the stocks of the different public companies; all which are made capital felonies. By referring to the terms of the stats. 8 Geo. 1. c. 22. s. 1. 31 Geo. 2. c. 22. s. 77. the 4 Geo. 3. c. 25. s. 15. and other acts, it will be seen that the actual completion of the fraud by the transfer of the stock, or the receipt of the dividends, is not necessary to constitute the offence. It is sufficient if the offender "falsely and deceitfully personate any true and "real proprietors of the said shares in stock annuities and "dividends (*a*), or any of them, or any part thereof, *and* "*thereby transferring*, or *endeavouring to transfer*, the stock, "or *receiving*, or *endeavouring to receive* the money of such "true and lawful proprietor, as if such offender were the "true and lawful owner thereof," &c.: in which case every offender is by the several acts made guilty of felony without benefit of clergy.

Vide ante, tit. *Forgery*, p. 853. and s. 46 to 50. inclusive. Ante, tit. *Forgery*, s. 9. 25. 28.

Vide 8 Geo. 1. c. 22. &c. ante, tit. *Forgery*, s. 9. p. 867.

§ 2.

What is an endeavour to receive, &c. by false personating.

As to what amounts to an *endeavour to receive*, &c. by false personating under these acts.

Parr's case, O. B. 1787, MS. Buller J. (2 Leach, 487. S. C.)

Francis Parr was indicted on the stat. 31 Geo. 2. c. 22. s. 77. for personating Isaac Hart, the real proprietor of 3900*l.* capital stock in the 3 per cent. consol. ann., and thereby *endeavouring to receive* 58*l.* 10*s.*, half a year's dividend on the said stock, being the money of the said I. H.

Obtaining a dividend warrant in the name of a real proprietor is an endeavouring to receive the money of such proprietor, within the stat. 31 Geo. 2. c. 22. s. 77.; *though the party were apprehended before he had taken any subsequent step towards obtaining the actual payment of the money made payable thereby at the pay-office.*

The case in proof was, that the prisoner had applied to the clerk, whose business it was to issue the dividend warrants upon that stock, in the name of Isaac Hart, for a warrant for half a year's dividend. The words used by the prisoner were, "Isaac Hart £.3900;" and he signed the book "Isaac Hart." Being asked of what place, he said of Windsor; which agreeing with the description in the book, a warrant was made out for 58*l.* 10*s.*, to which he again signed "*Isaac Hart*," and which was then delivered to him,

(*a*) This by stat. 31 Geo. 2. c. 22. s. 77. extends as well to stocks and funds thereafter to be established by authority of parliament, as to those then established.

Ch. XX. § 2. *Stockholders.*

him, and entitled the bearer to receive that sum at the pay-office. He was apprehended some minutes after, without its appearing that he had made any application at the pay-office, or had even gone towards it, or taken any step whatever after receiving the dividend warrant towards obtaining the actual payment of the money made payable thereby; which it was objected by the prisoner's counsel was necessary to the completion of the offence. The jury found him guilty, subject to the opinion of the Judges on the question, whether these circumstances amounted to *an endeavour to receive the money* of I. H. within the true intent and meaning of the act? And in Hilary term 1787 all the Judges held the conviction right.

Vide 2 Leach, 490.

Mr. Justice Gould, in delivering their opinion at the O. B. in February 1787, observed that the very object of the Legislature was to prevent the completion of the mischief, if possible, by prohibiting even the *endeavour* to obtain the property of others in the funds. That the very statement of the facts shewed that the prisoner, by personating the proprietor and by obtaining and indorsing the warrant as such, thereby made an *endeavour*, as far as it went, towards receiving the dividend.

Witness. *Vide* tit. *Forgery*, p. 997.

In that case it is to be remarked, that Isaac Hart the proprietor was examined as a witness to prove the identity of the person intended to be defrauded.

§ 3. *Personating seamen, &c.* Ante, ch. 19. s. 25. 31 G. 2. c. 10. s. 24.

It has also been shewn that "whosoever willingly and "knowingly shall personate or falsely assume the name or "character of, or procure any other to personate or falsely "to assume the name or character of any officer, seaman, or "other person entitled or supposed to be entitled to any "wages, pay, or other allowance of money or prize money, "for service done on board of any of the King's ships or "vessels, or the executor, or administrator, wife, relation, "or creditor, of any such officer or seaman, or other per-"son, in order to receive any wages, pay, or other allow-"ance of money, or prize money, due, or supposed to be "due or payable, for or on account of the services of any "such officer, or seaman, or other person, as aforesaid; "shall (on conviction) be deemed guilty of felony without "benefit

" benefit of clergy," by stat. 31 Geo. 2. c. 10. s. 24. and other acts. In addition to which,

Ch. XX. § 3.

Seamen and marines, &c.

By stat. 3 Geo. 3. c. 16. s. 6. " Whosoever willingly and " knowingly shall personate, or falsely assume the name or " character of, or procure any other to personate, or falsely " to assume the name and character of, any person entitled, " or supposed to be entitled, as an out-pensioner, to any " out-pension or allowance of money from the commission- " ers or governors of Greenwich Hospital, in order to re- " ceive the money due or supposed to be due on such out- " pension, every such person so offending, and being lawfully " convicted of any such offence, shall be deemed guilty of " felony without benefit of clergy."

Out-pensioners of Greenwich Hospital.

3 Geo. 3. c. 16.

§ 4.

The false personating must be in order to receive the wages, &c. due or supposed to be due.

By the words of the several statutes last above referred to, the false personating must be done *in order to receive the wages*, &c. of some seaman, &c. *entitled or supposed to be entitled* thereto: there must therefore be some evidence to shew that there was such a person of the name and character assumed, who was either entitled, or might primâ facie at least be supposed to be entitled to receive on board such a ship the wages, &c. attempted to be acquired.

Brown's case, Winchester Sp. Ass. 1800, MS. Jud.

The personating must be of some existing person entitled or who primâ facie might be entitled to receive the wages, &c. therefore it not appearing there was any such seaman on board a certain ship as the character assumed, a conviction on the stat. was holden wrong.

Charles Brown was indicted on the stat. 31 Geo. 2. c. 10. for that he willingly, knowingly, and feloniously personated and falsely assumed the name and character of Wm. Wheeler, a person supposed to be entitled to certain prize-money for service done on board his majesty's ship Terpsichore, in order to receive certain prize-money, supposed to be due and payable for and on account of the services of the said William as aforesaid, against the statute, &c. A second count charged that the prisoner feloniously forged and counterfeited, and procured to be forged and counterfeited, a certain paper-writing, purporting to be an authority from one William Wheeler, a person supposed to be entitled to certain prize-money on board of the said ship Terpsichore, in order to receive such prize-money, supposed to be due to the said William Wheeler as aforesaid; which said forged and counterfeited paper-writing is as follows; viz. " I do " hereby authorise all whom it may concern to pay to the " order of Mr. J. Jacob, No. 2. St. George-square, Portsea, " navy agent, the prize-money due to me as a marine on " board

Ch. XX. § 4. *Seamen and marines, &c.*

" board his majesty's ship Terpsichore, for the capture " of all prizes between 26th Nov. 1793 till 13th August " 1798; dated 10th January 1800; for which this shall be " a sufficient warrant. his

" Wm. ⋈ Wheeler, mark."

against the statute, &c. A third count was for knowingly uttering the same, with intent to defraud Judah Jacob; against the statute, &c.

It appeared in evidence that on the 10th of January 1800 the prisoner came to Judah Jacob's house, who was a navy-agent at Portsea, and told his wife that his name was William Wheeler, and that he was entitled to prize from the Terpsichore. He produced a certificate to that effect, from which she filled up an order in the usual form, and gave it to him to take to the dock-yard to sign. He accordingly took it away, and afterwards brought it back, (being the order set forth in the second count), saying it had been signed by him, and a gentleman in the dock-yard had witnessed it; and pleading distress, he received from her 5s. in advance. The certificate produced by the prisoner was proved to have been signed by the proper officer, but he did not know the prisoner's person at the trial. It appeared afterwards that his name was Brown. Being convicted on the two first counts, it was objected, first, that there was no evidence that William Wheeler ever served on board the Terpsichore in any capacity, or indeed that any such person existed. Secondly, that the personating intended by the statute was a personating in order to the party's personally receiving the money of those who had authority to issue it, and not as in this case an assumption of the character in the act of forging an authority for another to receive it, with intent to cheat such third person. Thirdly, that there was an omission in the second count of the word witness, under which the attesting witness's name was to have been written, which word was in the paper signed by the prisoner. The Judges on conference in Easter term 1800 held that the conviction was wrong; there being no evidence that there was any such person as Wm. Wheeler who either was entitled or at least primâ facie entitled to prize-money, as a seaman on board the Terpsichore.

(*Vide* 9 Geo. 3. c. 30. s. 6.)

A similar

A similar case of one Charles M'Annelly was submitted to the consideration of the Judges at the same time, and received a like determinaton.

Ch. XX. § 4. *Seamen and marines.*

§ 5. *Acknowledging deeds, fines, bail, &c in another name.*

By stat. 21 Jac. 1. c. 26. s. 2. "All and every person "and persons who shall acknowledge or procure to be acknowledged any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name or names of any other person or persons not privy or consenting to the same; and being thereof lawfully convicted or attainted, shall be adjudged felons, without benefit of clergy;" (saving corruption of blood and loss of dower). Sect. 3. provides that the act "shall not extend to any judgment "acknowledged by any attorney of record for any person "against whom any such judgment shall be given."

21 Jac. 1. c. 26.

This act extended only to proceedings in the courts themselves: and therefore by stat. 4 W. & M. c. 4. s. 1. the Chief Justices of B. R. and C. B., and the Chief Baron, may respectively, together with one other Judge of their respective courts, appoint commissioners (other than common attornies and solicitors) in every shire and county within England, Wales, &c. to take recognizances of special bail or bail pieces in actions and suits depending in their several courts. And by s. 3. any Judge of assize in his circuit is empowered to take such recognizances. Then by s. 4. "any person or persons, who shall, before any person or "persons empowered by virtue of this act as aforesaid to "take bail or bails, represent or personate any other person "or persons, whereby the person or persons so represented "and personated may be liable to the payment of any sum "of money for debt or damages to be recovered in the "same suit or action wherein such person or persons are "represented and personated, as if they had really acknowledged and entered into the same; being lawfully convicted thereof, shall be adjudged felons, and suffer, &c. "as felons," &c.

4 Blac.Com.128. 4 W. & M. c. 4.

Under the act of King James, it has been holden that the bare personating of bail before a Judge at chambers, or the acknowledging thereof in another name, is no felony unless the

1 Hawk. ch. 45. s. 10. 1 Hale, 696. Timberly's case, 2 Sid. 90

Ch. XX. § 5. *Bail.*

the bail be filed; but only a misdemeanor. But in Beasly's case, though the bail-piece were filed at Westminster, the trial was had in London, the county where the bail was personated; though according to the report of the same case in Ventris, Twisden J. said that it must be tried in Middlesex where the bail-piece was filed; the entry being, venit coram domino rege, &c. Where bail was put in under feigned names, there being no such persons, it was holden not to be within the act; but the court of C. B. ordered the bail and the attorney to be set in the pillory.

Beasly's case, O. B. 28 Car. 2. T. Jones, 64. *Sed vide* 2 Ventr. 301. S. C.

Anonymous, 1 Stra. 384.

§ 6. *At common law.*

In all other cases, not made felony by statute, the bare fact of personating another, though for the purpose of fraud, can in no instance amount to more than a cheat or misdemeanor at common law, and punishable as such. It was so considered in the case of John Hevey, who was acquitted on the first indictment against him for forgery; it appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person. Neither indeed did the second indictment against him for the misdemeanor turn singly on the fact of such false personating for a fraudulent purpose, but was framed against him and his associates for the conspiracy as well as cheat, upon which they were all convicted.

Ante, *Forgery*, s. 5. p. 856.

So where a woman living in the service of her master conspired with another man that he should personate her master, and in that character should solemnize a marriage with her; which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And such I have before shewn was the true ground of the judgment in the case of Macarty and Fordenbourgh.

Rex v. Robinson and Taylor, O. B. cor. Lord Ch. J. Willes, Foster J. and Reynolds B. 1 Leach, 44.

Ante, p. 823, 4.

In Dupee's case, however, where the indictment only charged that he personated one A. B., clerk to H. H., a justice of the peace, with intent to extort money from several persons in order to procure their discharge from certain misdemeanors for which they stood committed; the Court

Dupee's case, M. 12 Geo. 1. 2 Sess. Cas. 11.

Court would not quash it on motion, but put the Defendant to demur to it.

Ch. XX. § 6. *At common law.*

It might probably have occurred to the Court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another; it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices.

CHAP. XXI.

ARSON.

At Common Law.

The malicious and voluntary burning the House of another. - - - - § 1.

By Statute. - - - - § 2.

The Stat. 23 H. 8. c. 1. and 25 H. 8. c. 3., ousting Clergy from Arson, repealed by Stat. 1 Ed. 6. c. 12.; but Accessaries before ousted of Clergy by Stat. 4 & 5 Ph. & M. c. 4. and by Implication the Principals. *ib.*

By Stat. 43 Eliz. c. 13. burning any Barn or Stack of Corn or Grain in the northern Counties, Felony without Clergy. *ib.*

By Stat. 22 & 23 Car. 2. c. 7. burning *in the Night-time* any Ricks or Stacks of Corn, Hay, or Grain, Barns, or other Outhouses or Buildings, or Kilns, Felony; but Offender may avoid Death by chusing to be transported. *ib.*

But by Stat. 9 Geo. 1. c. 22. setting Fire to any House, Barn, or Outhouse, or to any Hovel Cock, Mow, or Stack of Corn, Straw, Hay, or Wood; or rescuing any Person in Custody for the same; or by Gift or Promise, &c. procuring another to join in such unlawful Act; Felony without Clergy. *ib.*

So the burning of any Mill, by Stat. 9 Geo. 3. c. 29. *ib.*

1. *The Burning must be malicious and wilful.* § 3.

If by Negligence or Mischance, though amounting to a Trespass, no Felony. *ib.*

Aliter, if maliciously intending to burn one House he burn another. *ib.*

Although the Intention were only to burn his own. *ib.*

But by Stat. 6 Ann. c. 31. a Servant *negligently* setting Fire to House or Outhouse forfeits 100*l.* and to be sent to House of Correction for 18 Months. *ib.*

2. *There*

2. *There must be an actual Burning of Part at least of the House.* - - - § 4.

"*Setting Fire to*" in the Stat. 9 Geo. 1. c. 22. means a *Burning*. *ib.*

Burning Paper in Paper-Mill, not sufficient. *ib.*

3. *What the House, &c.* - - - § 5.

Extends to Outhouses, Parcel of the Dwelling-house. *ib.*

So burning a Barn having Corn or Hay in it, Arson at common Law. *ib.*

But sufficient, though empty, under Stat. 9 Geo. 1.; and it is not material under that Statute whether the Fact be done in the Night or by Day. *ib.*

A common Gaol, the Entrance to which was through the Gaoler's Dwelling-house, held *a House* within Stat. 9 Geo. 1. *ib.*

A detached Building, though Parcel of a Mansion in Law, may be charged as an *Outhouse* under the Stat. 9 Geo. 1. *ib.*

4. *What the House, &c. of another.* - § 6.

To constitute Felony either at common Law or by Statute, the Burning must be of a House, &c. *in Possession* of *another*. *ib.*

The Offence therefore cannot be committed by a Lessee for Years, or a Mortgagor in Possession. *ib.*

But one entitled only to Dower may commit Arson of the House in Possession of a Lessee; and so it seems may a Reversioner in Fee. *ib.*

A Pauper put into a House by Parish Officers to inhabit as a Servant may commit Arson of it. *ib.*

But one maliciously burning his own House, a Misdemeanor, especially if near other Houses or Property thereby endangered. - - - § 7.

And if others in fact burnt, Felony. - § 8.

Principals and Accessaries—Clergy. - § 9.

Principals ousted of Clergy in all Cases within Stat. 9 Geo. 1. c. 22. if not by prior Statutes. *ib.*

So,

So, if required by Order of the King in Council, and neglecting to surrender in 40 Days. *ib.* - § 9.

Accessaries before to wilful burning of any Dwelling-house, or Barn, having Corn or Grain in it, ousted of Clergy by Stat. 4 & 5 Ph. & M. c. 4. *ib.*

Accessaries after entitled to Clergy, except after the King's Proclamation as above. *ib.*

Trial. - - - - § 10.

May be in any County in England.

Indictment and Evidence. - - § 11.

At common Law, Offence must be laid to be done *wilfully (or voluntarily) and maliciously*, as well as *feloniously*. *ib.*

Indictment on the Stat. 9 Geo. 1. c. 22. laying the burning of a *House*, good enough, without saying *Dwelling*-house. *ib.*

If the Burning be of an *Outhouse*, it need not be shewn of what Description, under the Stat. 9 Geo. 1. *ib.*

The House must be charged to be *burned* or *set Fire to*. *ib.*

As to the *Intent*. *ib.*

Must shew it to be the House *of another*, and state to whom belonging. *ib.*

The Property must be laid in the actual Tenant, though only such by Sufferance. *ib.*

Though laid to be done in the *Night-time*, yet not material to be proved. *ib.*

Evidence of Part of the Goods in the House fired being afterwards found concealed in the Prisoner's House, admitted as a Circumstance to shew his Presence at the Fact. *ib.*

Arson.

THE offences which follow next in order are such as are committed against property, not merely lucri causâ, as those already noticed, but from a mischievous or vindictive motive;

Ch. XXI. §1.
4 Blac.Com.244.

motive; and may for the most past be properly classed under the general description of *malicious mischief*, as an excellent writer has done. Of these the principal is the wilful and malicious burning of houses, which is known in the law by the appropriate denomination of Arson. And as many statutes have passed against the offence of wilful and malicious burning, which have a direct reference to, and are engrafted upon, arson properly so called; I shall here touch upon such of them as are necessary for the elucidation of the present subject, leaving the consideration of others till I come to treat of *malicious mischief* in general.

§ 1.
Arson at common law.
3 Inst. 66.
M. 11 H. 7. fo. 1.
1 Hale, 566.
1 Hawk. ch. 39.
Sum. 85.
Staundf. lib. 1. c. 33. 2 Inst.148.
4 Blac.Com.220.

Arson, which was felony at common law, and anciently punished with death, is described to be the malicious and voluntary burning the house of another.

This definition will be examined in all its parts;

1. *As to what shall be said to be malicious and voluntary.*
2. *What a burning.*
3. *What the house or other description of property comprised in this offence at common law, or in the statutes aftermentioned.*
4. *What the house, &c. of another.*

But first it will be proper to collect in one view the several statutes which have been passed relating to the subject more immediately under consideration, as they serve to throw light upon some parts of it; and the same illustration will frequently apply both to the common and statute law.

§ 2.
By statute.
23 Hen. 8. c. 1.
1 Hale, 571.

By the stat. 23 Hen. 8. c. 1. s. 3. "No person or persons found guilty (amongst other offences) for wilful "burning of any dwelling-houses or barns wherein any "grain of corns (*a*) shall happen to be; nor any person or "persons being found guilty of any abetment, procurement, "helping, maintaining, or counselling, of or to such felonies, "shall be admitted to the benefit of clergy, &c. except "persons in holy order of subdeacon or above." This was

(*a*) Lord Hale, 1 vol. 571. cites the statute in these words, "grain *or* corn." So the stat. 25 H. 8. c. 3. (I quote from Runnington's edition) recites the former statute as having the words "*grain or corn.*" This latter is again recited in the stat. 5 & 6 Ed. 6. c. 10. with the words "grains of corn." And again, the stat. 4 & 5 Ph. & M. has the words, "corn or grain."

extended

Ch. XXI. § 2. *By statute.*

25 Hen. 8. c. 3.

extended by stat. 25 H. 8. c. 3. s. 2. to such as stand mute, challenge peremptorily above twenty, or will not directly answer.

But these statutes were certainly repealed, as to the ousting of clergy from the offence in question, by the stat. 1 Ed. 6. c. 12. s. 10. which, after taking away clergy from several felonies by name, *omitting this*, enacts that "in *all other* "cases of felony, other than such as were before mentioned," offenders should "enjoy the benefit of clergy in the same "manner as before the first year of Hen. 8th." Some have thought that clergy was again ousted, in the instances before enumerated, by the operation of the stat. 5 & 6 Ed. 6. c. 10. s. 4. entitled "an act for the avoiding of clergy from divers persons;" which reciting the stat. 23 H. 8. c. 1. and that it was defective in not extending to cases where persons guilty of robbery and burglary in one county were taken with the goods in another county, and there tried and convicted of larceny; and reciting that this defect had been supplied by the stat. 25 H. 8. c. 3.; and reciting further that the act of the 1 Ed. 6. c. 12. (which omits as well to oust clergy from burglars and robbers taken with the goods in another county, and there tried, as from the offence of wilful burning of houses, &c.); had restored clergy in all other cases than those therein mentioned, as before the first of H. 8., "by reason of which "article and clause the stat. 25 H. 8. which did put *such* "felons and burglars from their clergy, that do such offence "in one county, and after are taken with the goods stolen "in another county and there indicted, &c. was made void; "by reason whereof divers persons that since the said 1 H. 8. "have committed *such robberies and burglaries* in one county, "and after have been taken with the mainer in another "county, and there indicted, &c. have had their clergy, "which they could not have had in case the said act of the "25 H. 8. had stood in force; for redress whereof enacts, "that the said stat. 25 H. 8. touching the putting of *such* "offenders from their clergy, and every article, clause, or "sentence contained in the same touching clergy, shall "from thenceforth touching *such* offences remain in full "strength and virtue, in such manner and form as before "the making of the said stat. 1 Ed. 6." &c.

Alex. Poulter's case, 11 Rep. 33—5. 1 Hale, 572. 2 Hawk. ch. 33. s. 42.

5 & 6 Ed. 6. c. 10.

But

Ch. XXI. §2. *By statute.*

But the opinion that this stat. revived the stats. 23 & 25 H. 8. in toto, as to the offence of wilful and malicious burning, is very ably controverted by Mr. Justice Foster, and by Lord Hale himself in the second part of his work; and both agree with the third resolution in Poulter's case, that the stat. 3 & 4 Ph. & M. c. 4. after mentioned, by taking away the benefit of clergy from the accessary before, by necessary construction took it from the principal in the like instances. But quâcunque viâ datâ, says Lord Hale, the law stands settled that clergy is taken away in all cases from the principal in wilful burning of a dwelling-house, or a barn with corn. However, the doubt in this respect probably suggested the precaution of enacting the provision in the stat. 9 Geo. 1. c. 22.

11 Rep. 35. Fost. 330. &c. 2 Hale, 347. and *vide* 1 Hale, 572. 4 Blac. Com. 229.

The stat. 4 & 5 Ph. & M. c. 4. enacts "That all and "every person and persons who shall maliciously command, "hire, or counsel, any person or persons wilfully to burn "any dwelling-house, or any part thereof, or any barn "then having corn or grain in the same; that then every "such offender being outlawed thereof, or being thereof "arraigned and found guilty, or being otherwise lawfully "attainted or convicted of the same offence, or being "arraigned thereof, do stand mute, or challenge peremptorily above 20, or will not answer directly to such offence, "shall not have the benefit of clergy."

4 & 5 Ph. & M. c. 4. *Accessaries before.*

The stat. 43 Eliz. c. 13. s. 2. enacts, "That whoever "shall wilfully and of malice burn, or cause to be burned, "or aid, procure, or consent, to the burning of any barn "or stack of corn or grain, within Cumberland, Northumberland, Westmoreland, or Durham, and shall be indicted "thereof and convicted, or shall stand mute, or challenge "peremptorily above 20, before the justices of assize, gaol-delivery, oyer and terminer, or of the peace, &c. shall "be adjudged felons, and suffer death without benefit of "clergy."

43 Eliz. c. 13. *Burning on the Northern borders.*

By stat. 22 & 23 Car. 2. c. 7. s. 2. "Where any person or "persons shall in the night-time maliciously, unlawfully, and "willingly burn, or cause to be burned or destroyed, any "*ricks* or *stacks* of corn, hay, or grain, barns, or other houses "or buildings, or kilns of any person or persons whatsoever; every such offence shall be adjudged felony:" but

22 & 23 Car. 2. c. 7. *Malicious burning in the night.*

Ch. XXI. § 2. *By statute.*

by s. 3. "without corruption of blood," &c.: And by s. 4. "If any person who shall be convict or attainted of any "offence hereby made felony (to avoid judgment of death "or execution thereupon) shall make his election to be *transported*, &c. then the justices of assize, oyer and terminer, "gaol delivery, and of the peace, before whom such offender "shall be convict or attaint by virtue of this act, respectively, shall cause judgment to be entered against every such "offender, that he be transported beyond the seas to some "of his majesty's plantations in the said judgment to be "particularly mentioned and expressed, there to remain for "seven years: And if any such offender shall return into "this kingdom before the expiration of the said seven years, "he shall suffer death as a felon, and as if no such election "to be transported had been made by him." By s. 7. offenders under this act must be proceeded against within six months after the offence committed.

Vi. Hassell's case, 1 Leach, 1—6.

It never was doubted but that burning *one rick*, &c. was within the statute, though in the plural.

9 Geo. 1. c. 22. *(Black Act.) Burning at any time.* Made perpetual by stat. 31 G. 2. c. 42.

But the principal statute is the 9 Geo. 1. c. 22. which enacts (s. 1.) that "if any person or persons shall (*a*) set fire "to any house, barn, or outhouse, or to any hovel, cock, "mow, or stack of corn, straw, hay, or wood; or shall "forcibly rescue any person being lawfully in custody of any "officer or other person for any the offences before mentioned; or if any person or persons shall by gift or promise of "money or other reward procure any of his majesty's subjects to join him or them in any such unlawful act; every "person so offending, being thereof lawfully convicted, shall "be adjudged guilty of felony, without benefit of clergy."

By s. 2. of the same act, offenders not surrendering on proclamation are also ousted of clergy.

Judd's case, 2 T. Rep. 255.

Henry Judd was bailed by the court of King's Bench on a warrant of commitment for setting fire to a *parcel* of unthreshed wheat, the fact as charged not being felony within this statute.

9 Geo. 3. c. 29. s. 2. *Burning mills.*

By stat. 9 Geo. 3. c. 29. s. 2. "Whereas no effectual "provision hath heretofore been made for preventing the

(*a*) The words "*unlawfully and maliciously*," and "*wilfully and maliciously*" which respectively occur in the paragraphs describing other offences before and after this in the same clause, are omitted in this paragraph. Sed *vide* post. s. 3.

"burning

" burning of mills, be it enacted, that if any person or per- Ch. XXI. § 2.
" sons shall (after the 1st July 1769) wilfully or maliciously *By statute.*
" burn or set fire to any wind-saw-mill, or other wind-mill,
" or any water-mill, or other mill; such person so offend-
" ing, being lawfully convicted thereof, shall be adjudged
" guilty of felony without benefit of clergy."

By s. 4. " No person shall be prosecuted by virtue of this *Limitation.*
" act for any offence committed contrary to the same, un-
" less such prosecution be commenced within 18 months
" after the offence committed."

§ 3.

1. It must be a malicious and voluntary burning, otherwise it is not felony, but only a trespass; and therefore no negligence or mischance amounts to it. As, if an unqualified person by shooting at game happen to set fire to the thatch of a house; or even if a man were shooting at the poultry of another. In this case however it should seem to be understood that he did not intend to steal the poultry, but merely to commit a trespass; for otherwise the first intent being felonious, the party must abide all the consequences.

Malicious and voluntary.
1 Hale, 567. 569.
3 Inst. 67.
Post. s. 11.

If A. have a malicious intent to burn the house of B., and in setting fire to it burn the house of C. as well as of B., or the house of B. escape by some accident, and the fire burn the house of C.; though A. did not intend to burn C.'s house, yet in law it shall be said to be a malicious and wilful burning of the house of C. And so, says Plowden, if one command another to burn the house of J. S., and he do so, and the fire thereof burn another house, the commander is accessary to the burning such other house.

1 Hale, 569.
3 Inst. 67.
1 Hawk. ch. 39. s. 5.
Plowd. 475.
Vide post. s. 8

And in this respect the stat. 9 Geo. 1. makes no difference; for the offences there mentioned must be done *wilfully and maliciously*, though not so expressed in the statute; for the malice makes the crime. They are not necessary however to be expressed in a declaration against the hundred for damages, as was holden by the court of C. B. in the case of Allan v. The Hundred of Kirton, though they thought it probable that the offence must be so charged in an indictment for the felony.

2 MS. Sum. 327.
2 Blac. Rep. 843.
4 Blac. Com. 222.
Vide Minton's case, post. 1021.

But by stat. 6 Ann. c. 31. any servant *negligently* setting fire to a house or outhouses, shall, on conviction before two justices of the peace, forfeit 100*l.*, or be sent to the house of correction for 18 months.

6 Ann. c. 31.
Negligent burning by servants.

2. To

Ch. XXI. § 4. *What a burning.*

§ 4. *What a burning.* 3 Inst. 66. 1 Hale, 568. Sum. 85. 1 Hawk. ch. 39. s. 4. 2 MS. Sum. 319. 4 Blac. Com. 222. R. v. Sarah Macing, O. B. 1761.

2. To constitute arson at common law there must be an *actual burning* of the house, or of some part of it; though it be not necessary that any part be wholly consumed, or that the fire should have any continuance, but be put out or go out of itself. But merely putting fire into or towards a house, however maliciously, if either by accident or timely prevention the fire do not take, and no part be burned, does not amount to arson at common law. The stat. 9 Geo. 1. c. 22. does indeed in enacting the felony make use of the words "*set fire to*;" but I am not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law; and the contrary opinion may be collected from what was said in Spalding's case, and Breeme's case, and in the following case of Sarah Taylor.

Post. s. 6.

Taylor's case, Rochester, 1760, cor. Legge B. 1 Leach, 58.

Sarah Taylor was indicted for setting fire to an outhouse, commonly called a paper-mill. It appeared that she had set fire to a large quantity of paper which was drying in a loft annexed and belonging to the mill; but no part of the mill itself was consumed; and therefore the Judges thought the case not within the statute on that ground; though another doubt was started whether a *mill* were an *outhouse* within the meaning of the act.

§ 5. *The house.* 1 Hale, 567. 570. Sum. 86. 3 Inst 67. 69. 1 Hawk. ch. 39. s. 1, 2. 4 Blac. Com. 221.

3. What is understood by *the house*. This extends at common law not only to the very *dwelling-house*, but to all *outhouses* which are *parcel thereof*, though not adjoining thereto, nor under the same roof. And yet the indictment need not charge the burning to be of a *mansion-house*, but only of *a house*. What constitutes an outhouse to be parcel of the dwelling-house was considered at large in treating of burglary, to which I refer. But the burning of a barn, though no part of the mansion, if it have corn or hay in it, is felony at common law. And it has also been said, that at common law arson extended to the burning of a stack of corn: but since the passing of the several statutes above referred to, it is become unnecessary to discuss this and other doubtful questions of the like nature.

Ante, 492.

Donnevan's case, Lancaster, 1770, 2 Blac. Rep. 682. (1 Leach, 81. S. C.)

Upon the construction of the stat. 9 Geo. 1. c. 22. it has been holden that a common gaol is a house within the meaning

The house.

fing of it. The entrance to the prison was through the dwelling-house of the gaoler, and the prisoners were sometimes allowed to lie in it. All the Judges held that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One set of the counts there laid it to be the house of the corporation, another of the gaoler, and a third of the person whom the gaoler suffered to live in the dwelling-house.

Minton's case, Hereford Spring Ass. 1786, cor. Buller J. MS. Gould and Buller Js. and MS. Jud.

Though an indictment for setting fire to a barn state it to be in the night, yet that is not material to be proved under the stat. 9 G. 1. *nor is it necessary that the indictment should state that there was corn or hay in the barn. But though the word* maliciously *be not in the statute, Qu. if it must not be laid in the indictment?*

In Susanna Minton's case, the indictment charged that she feloniously and maliciously, &c. in the night-time set fire to a barn of Paul Gwatkin, and burned the same. It was proved that there was hay and corn in the barn; but it was not so stated in the indictment, which was drawn on the stat. 22 & 23 Car. 2. c. 7. The jury found the prisoner guilty of setting fire to and burning the barn, but not in the night-time. It was objected that this verdict amounted to a complete acquittal, and that no judgment could be given against the prisoner; upon which the judgment was respited. In Easter term 1786, ten Judges present, all held that the prisoner was properly convicted; for though the indictment laid the offence to be done *in the night-time*, which would have been necessary to have brought the case within the stat. 22 & 23 Car. 2. yet that that fact was immaterial on the stat. 9 Geo. 1. which does away any such distinction, and extends generally to all barns of other persons, whether having hay or corn in them, or being empty; and whether burnt in the day or night-time. Note, It seemed to be the opinion of all, that supposing it to be necessary that there should be hay or corn in the barn, it must have been so stated in the indictment. So, though the word *maliciously* be not in the statute, Q. if it must not be stated in the indictment?

(Ld. Mansfield C. J. and Nares J. absent.) 2 MS. Sum. 327. MS. Buller J.

North's case, York Sum. Ass. 1795, MS. Jud.

Indictment for setting fire to an outhouse *is good and sufficient to oust the offender of clergy under the stat.* 9 G. 1. *though it may in point of law form part of the dwel-*

North was indicted for feloniously, wilfully, and maliciously, against the form of the stat. (9 Geo. 1. c. 22.) setting fire to a certain outhouse of John Taylor, situate at Knaresborough in the county of York. It appeared in evidence that the prisoner had set fire to and burnt part of a building of the prosecutor, which was situated in a yard of his at the back of his dwelling-house, which was in the street of the town of Knaresborough. The building was about four or five yards distant from the dwelling-house, but not joined

to

Ch. XXI. § 5. *The house.*

ing-house, the burning of which is arson at common law.

to it. The yard was inclosed on all sides, in part by the dwelling-house, in another by a wall, in a third by a railing which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public house, and also carried on the business of a flax-dresser. The buildings set fire to, and in part burnt, consisted of a stable, and a chamber over it, which was used by the prosecutor as a shop for keeping and dressing flax. It was objected on behalf of the prisoner, that this building was not an *outhouse* within the stat. 9 Geo. 1. c. 22. as that must be understood to mean outhouses which in contemplation of law were not part of the dwelling-house; which it was insisted this was, and that the indictment should have been for arson at common law. The jury found the prisoner guilty, and the point was reserved for the opinion of the Judges. On the 6th of *November* 1795 (Hotham Baron absent), all the Judges agreed that the verdict was right. It was observed, that though for some purposes this might be part of the dwelling-house; yet still it was in fact an outhouse. And *3 Inst.* 67. was referred to, where it is laid down, that to burn a stable and the like, parcel of the mansion-house, is felony; but that in the indictment it is sufficient to say domum, viz. a barn, malt-house, or the like, without saying mansionalem. And in Breeme's case it was considered that the stat. 9 Geo. 1. c. 22. did not alter the nature of the crime, or create any new offence, but only excluded the principal from clergy more clearly than he was before; which till then was only by inference from the stat. 4 & 5 Ph. & M. which took it from the accessary before the fact.

Post.

§ 6. *The house of another.* Post. s. 11.

4. It remains to be considered what is *the house of another* within the definition above laid down; for the dwelling-house or other description of property must be laid and proved to be in the possession quo jure of some other than the prisoner himself at the time of the fact committed. This inquiry is the more necessary, because in this particular it has been recently holden in Spalding's case, Breeme's case, and Pedley's case hereafter mentioned, that the stat. 9 Geo. 1. c. 22. and the other statutes make no difference in the nature of the offence; they being all confined to a burning the property of another. Upon this head Holmes's

case

Ch. XXI. § 6.
The house of another.

case is the first and leading determination, founded as it should seem upon the ancient definition of this offence. He was indicted, for that being possessed of a house in London under a lease for six years, remainder to another for three years, reversion in fee to another, he vi et armis, feloniously, maliciously, &c. burned the said house, with intent the same dwelling-house, and also divers other dwelling-houses of divers liege subjects of the King then and there situate and being, contiguous and adjacent to the said dwelling-house of the Defendant, then and there feloniously, wilfully, and maliciously to burn and consume with fire, against the peace, &c. Being convicted, and the record removed by certiorari into B. R. before judgment, it was holden by three judges against Croke that it was not felony to burn a house whereof the party was in possession under a lease for years; for it must be the house of another, which could not be said in the case of a lessee for years in possession at the time of the burning. Wherefore, (as the report improperly states,) the prisoner was discharged of the *felony:* but because of the heinousness of the offence he was severely fined and imprisoned, set in the pillory, and bound for his future good behaviour for life. Upon the supposition that this was an indictment for felony, in which the prisoner had judgment as for a misdemeanor, the judgment, as such, is justly disapproved of by Lord Hale; because the prisoner was thereby deprived of those advantages for his defence which he would otherwise have had: and it has been since condemned in Westbeer's case. But that is an inaccurate view of the case, the true account of which is to be found in Kelyng; by whom it is observed, that all the special matter being laid in the indictment, and the Defendant found guilty of the charge as laid; it being in law no felony, he was consequently found guilty of the trespass and misdemeanor, for which he had judgment; and Lord Mansfield explained it in the same manner in Scofield's case.

R. v. Holmes, Cro. Car. 376. & W. Jones, 351. 4 Blac. Com. 221. 1 Hale, 568. *Vide* Bract. lib. 3. 146. b. Brit. 16. Flet. lib. 1. c. 35. Mirr. c. 1. s. 8. 3 Inst. 66.

2 Hale, 172. (Sed *vide* a satisfactory explanation in Scofield's case, Cald. 401. and Kel. 29.)

R. v. Westbeer, T. 13 & 14 G. 2. *Vi.* 2 Stra. 1137.

The principal point in Holmes's case has been also called in question by Mr. Justice Foster in the case of Elizabeth Harris. The prisoner, who was a girl of 14 years of age, but of sufficient understanding for her age, was indicted for maliciously setting fire to and burning a dwelling-house in the possession of Edward Stokes; and Ann Course, the mother

Harris's case, Aylesbury Lent Assizes, 1753, cor. Dennison J. Fost. 113.

One entitled only to dower out of a

Ch. XXI. § 6. *The house of another.*

house, which was leased to another, may commit arson of it; and so it seems if the legal reversion had been in the prisoner.

ther of the prisoner by a former husband, J. Harris, was indicted as an accessary before the fact. J. Harris died, seised of the equity of redemption of this and another house adjoining, subject to a mortgage term, which equity descended to his eldest son, who was left with other children under the care of their mother Anne. Anne was entitled to dower out of these houses, but it was never assigned; and she let them to Stokes, and received the rent. But having a large family, she was obliged to ask relief of the parish, which the overseers refused, unless they were let into the receipt of the rent. On this she made frequent declaration that she would burn the houses down, which was at length effected by means of her daughter *Elizabeth*, whom she employed for that purpose. Both the prisoners being found guilty, their case was reserved for the consideration of the Judges, who unanimously agreed that it was felony in both. The only doubt was with regard to the interest which the prisoner Anne had in the house, which was grounded on the reasoning in Holmes's case; for unless she were guilty of felony, the charge against the prisoner Elizabeth, who acted by her directions, must also have failed. Of Holmes's case it was said that he had the possession by legal title, and during the continuance of his lease could maintain his possession against all mankind; and therefore the house might in a limited sense be called his own. But in the present case the possession was in Stokes under a demise from Anne on behalf of her son; and her title to dower, had Stokes's interest been out of the case, did not so much as give her a right of entry, it being a bare right of action. It was also said in the debate of this case by some of the judges, and not denied by any, that had Anne been seized of the freehold and inheritance of the house, and Stokes in possession under a lease, it would have been felony in Anne to have burned it. The principle that three of the Judges went upon in Holmes's case, adds Mr. Justice Foster, seems to warrant this opinion: they considered the house as Holmes's *own house*, by reason of the estate he had in it under his lease. Croke J. did not dispute the principle, though he argued against the conclusion the other Judges drew from it. And if this be so, Mr. Justice Foster says, he does not see why it may not with strict legal propriety be said of a reversioner,

4 Blac. Com. 221. S. P.

The house of another

reversioner, who should maliciously set fire to houses in the possession of his tenants under leases, that he ædes alienas combussit. In Holmes' case, he adds, the house might with strict legal propriety have been considered as the house of the landlord: both landlord and tenant have a property, one temporary and limited, the other absolute and perpetual. Both the prisoners were afterwards sentenced to death, but Elizabeth, being young, and acting under her mother's direction, was reprieved and recommended to mercy on condition of transportation.

Notwithstanding, however, the weight justly annexed to the opinion of Mr. Justice Foster, the point ruled in Holmes' case has since been determined to be law, and the precedent adopted in several late determinations.

Spalding's case, Bury Spr. Ass. 1780, cor. Buller J. MS. Buller J. and Gould J. (1 Leach, 258. S. C.)

Mortgagor in possession burning his own house, no arson either at common law or by stat. 9 Geo. 1. c. 32.

William Spalding was indicted in the first count for feloniously, wilfully, and maliciously setting fire to and burning his own house at Hartest, against the peace, &c. and in the second count for feloniously, voluntarily, and maliciously setting fire to his own house, against the form of the statute. The prisoner's house, which had been previously insured by him, was in the village of Hartest in Suffolk, not adjoining to, but within two or three yards of other houses on each side; and in consequence of his setting fire to it, of which there was no doubt, some part of the timber and thatch was burned. It appeared that the prisoner had before insured the house and goods for 100*l.* and that in 1776 he had surrendered the premises, being copyhold, to the use of one Nott, to secure 60*l.* lent thereupon; but Nott was never admitted. The prisoner being convicted of the fact, Buller J. respited the judgment, and submitted to the Judges, 1st, Whether the indictment were properly adapted to the case; 2dly, Whether evidence respecting the insurance and the mortgage ought to have been received; 3dly, Whether the offence proved amounted to arson. Upon the first question all the Judges (absent De Grey C. J. and one place being vacant) were of opinion that the indictment was bad: for that arson at common law was the burning of the house of another, according to the resolution in Holme's case, which must govern: and that the stat. 9 Geo. 1. c. 22. did not create a new offence, but only excluded the principal from clergy more clearly in respect of what was arson at common law: it being doubtful before that statute, whether

13th April 1780.

Vide 4 Blac. Com. 222, 3. and Alexander Poulter's case, 11 Co. 29. Fost. 330 to 336.

Ch. XXI. § 6. *The house of another.*

ther or not the principal, or at least persons in holy orders, were entitled to the benefit of clergy in arson.

Breeme's case, O. B. April 1780, cor. Eyre B. MS. Buller J. (1 Leach, 261. S. C.) and 2 MS Sum. 319. *No arson by lessee to burn the house in his possession under the lease.*

Andrew Breeme was indicted for arson of a house at common law, and upon the statute 9 G. 1.; and the indictment, which contained several counts, respectively charged it to be the house of William Bolton, of Stone Tuppen, and of the prisoner himself. The jury found him guilty, and also found that the prisoner wilfully and maliciously set on fire and burnt the house mentioned in the indictment, which was in lease to him from Stone Tuppen for the term of three years, who was possessed of it for a term of 99 years under Bolton. On the 26th of May 1780, the Judges (Lord Mansfield and De Grey C. Js. absent, and one place vacant,) debated this case, and all but Nares J., who the next day also concurred, held that the prisoner was not guilty of felony. They said, as in Spalding's case, that arson is the burning the house *of another:* that it is an offence immediately against *the possession:* and that therefore, if a person in possession of a house as tenant, however short his term may be, set fire to it, it is not arson. They all thought that Holmes' case could not be departed from, though some thought that possibly it might have been otherwise determined at first. Others, however, held the principle of that case to be right, considering the offence to be created for the protection of the party in possession. And all the Judges again held that the stat. 9 Geo. 1. did not vary the offence, but was passed to exclude clergy from the principal more clearly than it was before; and particularly adverted to a clause at the end of that act for securing damages to the party injured.

MS. Gould J.

Rex v. Pedley, B. R. Trin. 22 Geo. 3. MS. (Cald. 218. and 1 Leach, 277. S. C.) *Vide* 1 Hale, 568.

These cases were again recognised in that of Pedley, who, in one amongst other counts of the indictment, was charged with burning his own house. Though Ld. Mansfield said that if Holmes' case had been a new question he should not have been singly of a contrary opinion. Pedley was also charged with setting fire to his own house, with intent to burn the house of Richard Coombe, and (in another count) of the mayor of Bristol, near to the prisoner's own house, by which the said house of R. Coombe, &c. was set on fire and burned. The special verdict stated that the house had been demised by the mayor of Bristol to Coombe for 99 years, by him to one Parry for a year, and so from year to year, and by Parry

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to one John Landry for three months, who was in possession of it at the time of its being burned. And there being no count stating it to be the house of John Landry, the Court, who held that arson was an offence against *the possession of another*, gave judgment for the prisoner; but remanded him to custody, as he had not been tried for burning the house of the tenant. Ch. XXI. § 6. *The house of another.*

But it is not a mere residence in a house without any interest therein which will bring a party within the principle of the above cases. In William Gowen's case, it appeared that the house which had been burnt by him at Laxfield in Suffolk was rented by one Richard Dobney, named in the first count as the owner, and let by him from year to year to the parish officers of Laxfield, who paid the rent for it, and who were at the time of the burning the house the persons named (individually) in the third count of the indictment, which was framed as well at common law as on the stat. 9 Geo. 1. The prisoner was a poor man maintained by the parish, and had some time before the burning of the house been put by the parish officers to live there, and was resident therein with his family at the time of the fact being committed, and had the sole possession and occupation of it, without payment of any rent. The prisoner was found guilty; and on reference to the Judges in Michaelmas term 1786, they all held the conviction to be proper; for the prisoner had no interest in the house, but was merely a servant, and therefore it could not be said to be *his* house; but the overseers had the possession of it by means of his occupation. Gowen's case, Bury Sum. Ass. 1786, cor. Lord C. B. Skinner. MS. Buller J. and MS. Jud. *One put by overseers of the poor into a house to live there is merely a servant, and his possession is theirs, and he may commit arson by burning it.* *Vide* Rickman's case, post. s. 11. S. P.

Other nice questions have occurred in cases where the possession has been ambiguous, as against whose house the indictment should charge the offence to have been committed; but these will more properly come under consideration when I treat of the form of the indictment, and the proof necessary to support it. Post. s. 11.

§ 7.

But though arson can only be committed by burning the house of another, yet even the burning of a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor, and may be punished with fine and imprisonment, pillory and finding sureties, *Burning a man's own house.* 1 Hawk. ch. 39. s. 1. 1 Hale, 568, 9. Holmes' case, Cro. Car. 377. Sum. 85. 4 Blac. Com. 221.

Ch. XIX. § 7. *Of a man's own house.*

sureties, as was done in Holmes' case before mentioned. In some cases the indictment has laid the fact to be with intent to burn such other houses: but however such an intent may aggravate the offence, it is clearly not necessary to be laid or proved: such an act must in its nature create great danger and terror to the neighbourhood, be the intent what it may. And in Proberts' case, after mentioned, no other matter was laid in aggravation but the contiguity of other houses, which were thereby endangered.

Post. 1030.

It is also a great aggravation if one burn his own house in any situation with intent to defraud insurers: but I find no instance of an indictment sustained on that ground alone as the gist of the offence: it was otherwise laid in the cases of *Proberts* and *Isaac* after mentioned.

Scofield's case, Hil. 24 Geo. 3. B. R. Cald. 397.

Arson is an injury only to the actual possession, and must be so laid.

Where an indictment charges an act to have been done with a felonious *intent, and the jury find a verdict of guilty, if the charge, as laid, do not amount to felony, but amounts in law to a misdemeanor, the Court will pronounce judgment as for that offence.*

John Scofield was tried before Lord Mansfield, at the sittings at Westminster after Michaelmas term, 24 Geo. 3. on an indictment which contained six counts. The first count stated that the prisoner wickedly, unlawfully, and maliciously intending and contriving to feloniously set fire to, burn, and consume a certain house of one James Ramsey there situate, (of which house he the prisoner was *then possessed*, for a certain term of years then and yet to come and unexpired,) on, &c. with force and arms, at, &c. a certain lighted wax candle, which he the said prisoner had then lately before set fire to and lighted, did unlawfully, wickedly, and maliciously fix and put in a certain closet under and adjoining certain wooden stairs called the kitchen stairs, in the aforesaid house of the said James Ramsey; which said house was then situate in a certain neighbourhood and street there called New Bond-street, and contiguous and adjoining to certain dwelling-houses thereof, and belonging to divers liege subjects, &c.: and that he the prisoner did then and there unlawfully, wickedly, and maliciously put and place about, unto, and against the said lighted candle, so fixed and put by him in the said closet as aforesaid, divers matches, &c. and other combustible materials, *with a wicked and malicious intention, by means thereof then and there feloniously to set fire to the aforesaid house of the said James Ramsey, and to burn and consume the same*, to the great damage, &c. The second count no otherwise varied the charge than by describing the house to be the dwelling-house of the prisoner himself. The third count stated that the

the prisoner set fire to certain matches, &c. in a certain other house of the said James Ramsey, &c. under certain wooden stairs, &c. by means thereof feloniously to set fire to the said *last-mentioned house*, &c.: without stating, that it was in the possession of the prisoner, or that he had any term in it. The fourth count charged the offence to have been committed in the same manner, in the house of the prisoner. The fifth count charged an attempt to set fire to the house of the said James Ramsey; and the sixth count, an attempt to set fire to the house of the prisoner. All the counts in like manner charged the act to have been done with a wicked and malicious intention *feloniously* to set fire to the house, &c. but none of them charged an intent of setting fire to the adjoining houses. The jury having found the prisoner guilty; it was afterwards moved to arrest the judgment; 1st, because the indictment having charged the offence to have been done feloniously, it could only be sustained by shewing it to be a felony. 2dly, That if it were no felony the fact was not indictable at all, as it was merely an attempt to commit a misdemeanor. After argument, the Court took time to consider their judgment; and on the 11th of Feb. 1784,

Lord Mansfield C. J. delivered their opinion. He began by observing that the third count was clear of all objection: for there it was stated to be the house of J. Ramsey, without alleging that it was in the prisoner's possession; and as it would have been felony to have burnt such a house, the intent was there properly charged to be felonious. But as the evidence did not support that count, the judgment of the Court was founded on the first count. Then as to the the first objection urged against the first count; it was certainly true that it could be no *felony* in the Defendant to burn *a house of which he was in possession;* and that appearing upon the face of the indictment, by which the Court must see that the offence charged was not a felony, the word *feloniously* was repugnant to the legal import of the offence charged, and must be rejected as surplusage, and then judgment ought to be pronounced against the Defendant as for the offence of which he stood convicted; according to the precedent in Holmes' case, which was an authority expressly in point, and when examined and rightly understood was not liable to the objection made to it by Lord Hale. [He then explained the true ground of that judgment in the manner before

Ante, 1023.

Ch. XXI. § 7. *Of a man's own house.*

before stated]. In answer to the second objection, he observed that the offence did not rest in bare intention, which without an act done was not punishable by our law; but here was an act done, and then the law might judge not only of the act itself, but of the intent with which it was done; and that if the act were coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, the intent being criminal, the act became criminal and punishable. And that there was no difference in the description of the offence, though there was in the degree of guilt, whether the act were done with intent to commit a felony, or with intent to commit only a misdemeanor. And he referred to several authorities as supporting the general principle.

Proberts' case, B. R. Mich. 20 G. 3. MS. *Burning a man's own house contiguous to others, indictable as a misdemeanor at common law. If done with intent to defraud insurers, and other houses be burned in consequence, the latter is felony.*

The same doctrine was laid down in the case of William Proberts. He was indicted for a misdemeanor in having unlawfully, wilfully, and maliciously set on fire and burnt a certain house of William Bramwell, situate in the parish of St. Ann within the liberty of Westminster, then in the occupation of the Defendant, which said house was contiguous and adjoining to certain dwelling-houses belonging to divers liege subjects situate in the said parish, by means whereof the dwelling-houses of divers liege subjects were in great danger of being burned; to the damage terror and affrightment of all liege subjects near the said house of the said William Bramwell inhabiting and dwelling, to the great damage of the said W. Bramwell, and against the peace, &c. The second count laid it to be the Defendant's own house. The Defendant was tried and found guilty at the sittings in Trinity ter[illegible]799 before Ld. Kenyon C. J.; and being brought up for [illegible]ent in Michaelmas term following was sentenced by th[illegible]rt to two years imprisonment in Newgate, and during that time to stand once in the pillory at Charing-Cross, and to give security for his good behaviour for seven years from the expiration of his imprisonment, himself in 500*l.*, and two sureties in 50*l.* each. In passing sentence Gross J. said, that though by a lenient construction of the law of arson this offence was holden not to be felony, yet it was a misdemeanor of great magnitude, and deserving of the most exemplary punishment. And that if it had so happened that any of the neighbouring houses had been set

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Ch. XXI. § 7. *Of a man's own house.*

on fire in consquence of the Defendant's wilful and malicious act in setting fire to his own house, (which was proved to be done in order to cheat the insurance office,) it would clearly have amounted to a capital felony, and his life would have paid the forfeit.

§ 8. *Intent to burn a man's own house, and thereby burning another's. Vide* ante, s. 3. and 6 St. Tr. 222.

Hence it appears that though the primary intention of the party were only to burn his own house, yet if in fact others were burnt, being adjoining and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequence immediately and necessarily flowing from the original act done, it is felony. This has been before adverted to with another view, to shew that the malice shall be applied to the consequential act, and is also confirmed by an express decision on the point.

Isaac's case, Spr. Ass. 1799, cor. Buller J. MS.

John Isaac was indicted for a misdemeanor in having unlawfully, wilfully, and maliciously set on fire and burnt a certain house of Thomas Isaac, being in the occupation of the said John Isaac: which house the indictment alleged was contiguous and adjoining to certain dwelling-houses of divers liege subjects, &c.; by means whereof the same were in great danger of being set on fire and burnt. There was a second count which differed only in charging that the house set on fire was the prisoner's own house.

The counsel for the prosecution opened that the charge to be proved against the Defendant, though laid as a misdemeanor, was, that he wilfully set on fire his own house in order to defraud the Phœnix fire-insurance office; and that in fact his own and several *other persons' houses* adjoining were *burnt* down. Upon which Buller J. said, that if other persons' houses were in fact burnt, although the Defendant might only have set fire to his own, yet under these circumstances, the prisoner was guilty, if at all, of felony; the misdemeanor being merged; and he could not be convicted on this indictment; and therefore directed an acquittal.

4 Blac. Com. 221.

Principal and Accessary, and Clergy.

§ 9. *Principals and accessaries, or their clergy.* 2 Hawk. ch. 33. s. 43. 1 Hale, 570. &c. 2 Hale, 333. & ch. 46. Fost. 192. 331. &c.

Whatever doubt may formerly have been entertained, whether the stats. 23 H. 8. c. 1. s. 3. and 25 H. 8. c. 3. s. 2. ousting clergy from the principals in arson, which had been repealed by 1 Ed. 6. c. 12. s. 10., were revived in toto by stat. 5 & 6 Ed. 6. c. 10.; or whether the principals in arson were

Ch. XXI. § 9. *Principals and accessaries.*

were virtually excluded by the stat. 4 & 5 Ph. & M., which excluded the accessary before, it is unnecessary to consider; because clergy is now expressly denied to the principal in all cases within the stat. 9 Geo. 1. c. 22. But Lord Hale and Mr. Justice Foster are decidedly of opinion that the stat. 4 & 5 Ph. & M. had such an operation.

4 Blac. Com. 222. 11 Rep. 34. Plowd. 475. Ante, s. 2.

By the further provision of the stat. 9 Geo. 1. c. 22. the offender may be required by order of the King in council to surrender within 40 days in the manner set forth at large in another place, in default of which the Court may award execution.

Vide Process to bring in the party.

In addition to the above, the general stat. of the 3 W. & M. c. 9. s. 2. enacts that "If any person or persons whatsoever be "indicted of any offence, for which by virtue of any former "statute he or they are excluded from the benefit of clergy "if he or they had been thereof convicted by verdict or "confession; if he or they stand mute, or will not answer "directly to the felony, or shall challenge peremptorily "above 20, &c., or shall be outlawed thereupon, shall not "be admitted to the benefit of his or their clergy."

1 Hale, 573.

Accessaries after stand upon the same footing as in other felonies, and are not deprived of clergy by any statute, except after an order of the King in council, as abovementioned, in which case after the time limited in the order is expired, "such as conceal, aid, abet, or succour such "offender, knowing him to have been so charged and so "required to surrender, being lawfully convicted thereof, "are ousted of clergy."

Trial.

§ 10. *Trial.* 9 Geo. 1. c. 22.

By the 14th sect. of the stat. 9 Geo. 1. c. 22. "For the "better and more impartial trial of any indictment or in- "formation which shall be found, commenced, or prosecuted "for any of the offences against this act," it is enacted, "That every offence which shall be done or committed "contrary to this act shall and may be inquired of, exa- "mined, tried, and determined in any county within that "part of Great Britain called England, in such manner and "form as if the fact had been therein committed." Saving corruption of blood, loss of dower, and forfeiture of lands, goods and chattels.

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In Mortis's case it was holden to be at the option of any private prosecutor to prosecute in another county. Ch. XXI. § 10. *Trial.* Mortis's case, 2 Blac. Rep. 733.

Indictment and Proof.

§ 11. *Indictment and proof.*

The indictment for arson at common law must lay the offence to have been done *wilfully* (or *voluntarily*) *and maliciously*, as well as *feloniously*. And in Cox's case, where the indictment which was for perjury at common law, charged the offence to have been committed "falsely, maliciously, wickedly, and corruptly," all the Judges held that those words implied that it was done wilfully. And though the stat. 9 Geo. 1. has not the words "wilful and malicious," &c., yet it seems they are eqully necessary to an indictment under the statute; for malice is of the essence of the offence: and so it was considered by several of the Judges in Susan Minton's case; though that point was not necessarily under consideration. 1 Hawk. ch. 39. s. 5. 2 MS. Sum. 319. 327. Ante, s. 3. Rickman's case, post. 1034. Cox's case, 1 Leach, 82. S. Minton's case, ante, 1021. MS. Buller J.

It is agreed however, that laying the burning to be of *a house* is sufficient even at common law, without saying a *dwelling*-house. In Glandfield's case after mentioned, the indictment, which was framed on the stat. 9 Geo. 1., stated the burning to be of *outhouses* generally, which was ruled by Heath J. to be sufficient, without stating of what denomination of outhouses, such being the description in the statute 9 Geo. 1. 1 Hale, 567. Sum. 86. 1 Hawk. ch. 39. s. 1. 3 Inst. 67. post. 1034.

So it is sufficient to charge the burning of an *outhouse*, if it be such in fact, though in point of law it be parcel of the dwelling-house, as being within the curtilage. North's case, ante, 1021.

At common law it was necessary, as before observed, to state an actual burning; but the stat. 9 Geo. 1. using the term "*set fire to*" the house, it is now become common to state both, though in effect meaning the same thing. Ante, s. 4.

Where, in order to convict a party of a misdemeanor for burning his own house, it is necessary that the act should be founded upon some special evil intent to the property of others, it is necessary to lay such intent in the indictment. But whether or not such intent be a necessary constituent part of the offence, if it be laid and proved, it is a circumstance highly aggravating against the offender. Ante, s. 7.

Ch. XXI. § 11. *Indictment and proof.*

But where one intending only to burn the house of *A.* thereby burns the house of B., the indictment may charge him with the malicious and wilful burning of B.'s house.

1 Hale, 569.

From what has been said before it is plain that an indictment for arson must upon the face of it appear to be of the house *of another;* and it must also state whose house; and with that the proof must agree. An indictment charged that the prisoners, Martha Rickman, and Sarah Rickman, "feloniously, voluntarily, and maliciously set fire to *a certain house situate in the parish of Ellingham*, &c.; and by such firing as aforesaid feloniously, voluntarily, and maliciously burnt and consumed the same house, &c." against the form of the statute, &c. The prisoners were convicted; but judgment was respited. And afterwards, in Michaelmas term 1789, all the Judges held the conviction wrong, because the indictment did not state to whom the house belonged. And it having been proved in that case that the house belonged to the parish, and that they suffered one Thomas Early to live in it; but who were the trustees, or in whom the legal estate was vested, was wholly unknown; the Judges agreed that the house might have been laid to be the property of the overseers, or of persons unknown.

Whose house. Ante, s. 6. per tot.

Rickman's case, Winchester Sum. Ass. 1789, cor Buller J. MS. Buller J. and MS. Jud.

Ante, 1027.

It could not be said to be Early's house, on the same principle as in Gowen's case beforementioned: he was merely a servant of the parish.

It requires great nicety in some cases to distinguish the person, who may be said to occupy suo jure, and against whom the offence must be laid to have been committed. In Glandfield's case it appeared that the outhouses burned were the property of Blanche Silk, widow, but were only made use of by John Silk her son, who lived with her after his father's death in the dwelling-house adjoining the outhouses, and took upon him the sole management of the farm, with which these outhouses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother; and he paid all the servants, and purchased all the stock: but the legal property both in the dwelling-house and farm was in the mother, and she alone repaired the dwelling-house and the outhouses in question. Heath J. held that as to the stable,

Glandfield's case, Exeter Spr. Ass. 1791, cor. Heath J. MS.

pound.

pound, and hogsties which the son alone used, the indictment must lay them to be in his occupation; and as to the brewhouse, (another of the outhouses burned,) the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expences of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid in their joint occupation. The prisoner was afterwards convicted on a second indictment (*a*) drawn agreeably to this opinion; the first having improperly laid the whole premises as in the sole occupation of the mother; and he was executed.

Ch. XXI. § 11. *Indictment and proof.*

In Minton's case before stated, though the indictment, which was framed on the stat. 22 & 23 Car. 2. c. 17. charged the burning to have been *in the night-time*, and the fact was proved to have been committed by day, yet the conviction was holden proper; that circumstance being immaterial on the stat. 9 G. 1. c. 22.

Minton's case, ante, 1021.

In the case of the two Rickmans above mentioned, the proof adduced by the first witness of the prisoners' having been present in the house and implicated in the fact was, that a bed and blankets were afterwards found in their possession, which had been taken out of the house at the time it was fired, and concealed by them from that time. Buller J. doubted at first whether such evidence of another felony could be admitted in support of this charge: but as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, he admitted this amongst other evidence.

Rickman's case, ante, 1034.

(*a*) The second indictment contained two counts, the first laying the occupation in the son alone, the other laying it in the mother and son.

CHAP. XXII.

MALICIOUS OR FRAUDULENT MISCHIEF.

References to Offences *ejusdem generis* under other appropriate Titles. - - § 1.

Arson. Burning of all *Buildings*, *Stacks*, &c. *of Corn*, *Straw*, *Hay*, or *Wood*. *ib.*

Pulling down or beginning to demolish Houses, Mills, and Chapels by Rioters, referable to *Riot*. *ib.*

Nuisances, *Maims*, *Spoiling Cloaths*, *Piracy*, referable to other general Heads.

1. *In the Northern Counties.* - - § 2.

Making Prey or Spoil of Persons or Goods on deadly Feud or otherwise, or taking or giving *Blackmail*, or *burning* Barns or Stacks of Corn, Felony without Clergy by Stat. 43 Eliz. c. 13. *ib.*

Moss Troopers punishable capitally or by Transportation, by Stat. 18 Car. 2. c. 3. *ib.*

2. *By burning Grig*, *Ling*, *Heath*, *Furze*, *Goss*, or *Fern.* - - - § 3.

A Misdemeanor, by Stat. 4 & 5 W. & M. c. 23. and in Part inquirable before Justices of Peace by Stat. 26 Geo. 2. c. 9. passed for the better Preservation of the Game. *ib.*

3. *By Hunters.* - - - § 4.

Offences by such referable in Part to Larceny. *ib.*

Killing, *wounding*, *or destroying*, &c., *or attempting to kill*, &c. *Deer in inclosed Grounds*, Felony and Transportation by Stat. 42 Geo. 3. c. 107. *ib.*

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The same in *open Ground*, a Forfeiture of 50*l.* &c. for first Offence, and for second Offence Felony and Transportation for 7 Years. - - § 4.

Carrying offensive Weapon, where Deer kept, with Intent to hunt, &c., or *resisting Keepers*, &c. Felony and Transportation. *ib.*

4. *By burning Timber-Trees, Woods, Underwoods, Coppices, &c. Roots, Plants, &c.* - § 5.

The Statutes.

i. Barking *Fruit-Trees*, treble Damages to Party grieved, and Fine to the King, by Stat. 37 H. 8. c. 6. *ib.*

Damages recoverable against the Parish, &c, for the Destruction of *Trees* by Stat. 1 Geo. 1. st. 2. c. 48., the same as by Stat. 13 Ed. 1. st. 1. c. 46. for Hedges, &c. overthrown *in the Night. ib.*

ii. Malicious burning any *Wood, Underwood, or Coppice*, Felony by Stat. 1 Geo. 1. st. 2. c. 48. s. 4. *ib.*

Damages recoverable as by Stat. 1 Geo. 1, st. 2. c. 48. for the Destruction or spoiling of all Woods or Underwoods, Coppices, Trees, Poles, Springs of Wood, Thorns, and Quicksets, and for breaking down and destroying, &c. of all Gates, Pales, Rails, Fences, Ditches, Banks, &c. or other Inclosures of such Woods, &c. whether by Day or Night, by Stat. 6 Geo. 1. c. 16. explaining and amending the former Act. *ib.*

iii. By s. 2. of Stat. 6 G. 1. c. 16. destroying, burning, spoiling, &c. in open or clandestine Manner, or wrongfully and maliciously, all such *Woods, Springs of Wood, Underwood or Coppice*, or destroying, &c. *Hedges, &c.* or *Inclosures of such Woods, &c. Plantations, Timber, Fruit-Tree or other Trees, Thorns*, or *Quicksets*, inquirable before Justices of Peace in or out of Sessions, who on Conviction may award the same Penalties and Punishments as under Stat. 1 Geo. 1. st. 2. c. 48. *ib.*

Damages

Damages given to Party grieved by former Statutes extended to Trees in New Inclosures by Stat. 29 Geo. 2. c. 36. - - § 5.

iv. Stat. 29 Geo. 2. c. 36. gives the like Jurisdiction to Justices of Peace to inquire of the same *Trespasses* against New Inclosures as before given by Stat. 6 Geo. 1. c. 16. *ib.*

Observations on the abovementioned Statutes. § 6.

v. The unlawful and *malicious* Destruction of *ornamental, useful, or profitable Trees*, in any *Avenue, Garden, Orchard, or Plantation*, a capital Felony by Stat. 9 Geo. 1. c. 22. s. 1. - - § 7.

Trial in any County. *ib.*

vi. The destroying or spoiling *in the Night* of *Timber-Trees, or Trees likely to become such*, in open or inclosed Grounds, made a simple Felony and Subject to Transportation by Stat. 6 Geo. 3. c. 36. *ib.*

Extended to *Roots, Shrubs, or Plants*, of 5*s.* Value in Garden Grounds, &c. *ib.*

Includes *Aiders* and *Abettors*. *ib.*

The Owner of the Trees must be named in the Indictment. *ib.*

vii. Spoiling or destroying *Timber-Trees, or Trees likely to become such*, 1st Offence a Penalty; 2d Offence Felony and Transportation by Stat. 6 Geo. 3. c. 48. *ib.*

Plucking up, spoiling, or destroying *Roots, Shrubs, or Plants* in cultivated Lands; 1st and 2d Offence a Penalty; 3d Offence Felony and Transportation. *ib.*

Cutting, splitting, spoiling, damaging, or destroying, &c. any Kind of *Wood, Underwood, Poles, Sticks of Wood, Green Stubs*, &c. or having the same in Custody without good Account, for 1st and 2d Offence Penalties; for 3d Offence to be deemed an incorrigible Rogue. *ib.*

General View of the several Statutes. - § 8.

viii. By Stat. 37 H. 8. c. 6. burning *Heaps of Wood* prepared for making *Coals, Billets*, &c. treble Damages and Fine. - - - § 9.

5. *By*

5. *By maliciously burning Wains and Carts laden with Goods.* - - § 10.

Punishable by the last-mentioned Statutes in like Manner.

6. *By destroying or damaging Fences and Inclosures.* § 11.

Damages to be recovered against adjoining Towns for Hedges and Dikes overthrown, by 13 Ed. 1. st. 1. c. 46. *ib.*

Indictable Offence. *ib.*

Setting Fire to, destroying, or damaging *Inclosures* under any Act of Parliament, Felony and Transportation by Stat. 9 Geo. 3. c. 28. *ib.*

Pulling down, or destroying *Pales*, &c. of Grounds where *Deer* kept, Penalty or Imprisonment, &c. by Stat. 16 Geo. 3. c. 30. s. 8. and other Statutes. *ib.*

7. *In respect of Fish-Ponds.* - § 12.

Breaking down the *Head or Mound of any Fish-Pond*, whereby the Fish be lost or destroyed, *from Malice to Owner*, a capital Felony by Stat. 9 Geo. 1. c. 22. *ib.*

Trial in any County. *ib.*

Similar Offence, or cutting Heads or Pipes of Conduits, punishable as Misdemeanor by Stat. 37 H. 8. c. 6. *ib.*

By Stat. 5 Eliz. c. 21. breaking, &c. Heads or Dams of Ponds, &c. *to steal Fish*, Imprisonment and treble Damages. But if done with Intent only to *steal* the Fish, not within the Stat. 9 Geo. 1. *ib.*

8. *In respect of Hops.* - - § 13.

Maliciously cutting *Hop-binds* growing on Poles in Plantations, a capital Felony, by Stat. 6 Geo. 2. c. 3. s. 6. *ib.*

General Provisions of the Black Act extended to it by Stat. 10 Geo. 2. c. 32. *ib.*

9. *In*

9. *In obstructing the free Passage of Grain; or destroying Places where Grain is kept.* § 14.

Using Violence to any—or breaking or cutting Carriage or Harness of Horses conveying it—or injuring Horses—or cutting Sacks—or scattering such Grain; —Imprisonment on summary Conviction for first Offence, and Felony for second, by Stat. 36 Geo. 3. c. 9. and 11 Geo. 2. c. 22. *ib.*

Also Felony and Transportation to destroy *Granary* or other *Place where Grain kept*, or carrying away or scattering or spoiling *Grain*, *Flour*, *Meal*, or *Malt*. *ib.*

Returning from Transportation before the Term, ousted of Clergy. *ib.*

10. *To Cattle.* - - § 15.

Cutting out Tongue of tame Beast alive punishable by Treble Damages and Fine, by Stat. 37 H. 8. c. 6. *ib.*

By Sat. 22 & 23 Car. 2. c. 7. killing *Horses*, *Sheep*, *or other Cattle*, Felony and Death, but transmutable for Transportation. *ib.*

If Cattle not killed, punishable by treble Damages. *ib.*

But by Stat. 9 Geo. 1. c. 22. the *maliciously killing*, *maiming*, or *wounding any Cattle*, Felony ousted of Clergy. *ib.*

Extends to Aiders and Abettors, and such as do not surrender on Proclamation, &c. *ib.* (& s. 19.)

The *Malice* must be against the *Owner*, not against the *Animal*. - - - § 16.

Proof of the Prisoner's Dislike to the Horse injured, and Threat to do the Mischief if his Master would not let him have another, which was not complied with, not sufficient to bring the Case within the Black Act. *ib.*

So maiming Sheep, because they overleapt Bounds, not within the Act. *ib.*

But semble, that Evidence of *previous* existing Malice against the Owner not necessary, if on the Whole the Act appear to be done from Malice to him. *ib.*

No

No Indictment lies at common Law for unlawfully *with Force and Arms* maiming a Horse: but some special Force must be shewn. - § 17.

What CATTLE are within the Black Act. § 18.

Horses are so. *ib.* and - - § 19.

Wounding Cattle, though *the Injury be only temporary*, is within the Act, if done from Malice to Owner. § 20

11. *In respect to Manufactures.* - § 21.

i. Breaking into *House*, &c. *with Intent* to cut or destroy *Woollen Goods* in the Loom, or *Tools*, or *cutting* or *destroying* such, a capital Felony by Stat. 22. Geo. 3. c. 40. *ib.*

ii. The same as to *Silk.* - - § 22.

iii. The same as to *Linen* and *Cotton.* - § 23.

Extended to such Goods put out to bleach or dry, by Stat. 4 Geo. 3. c. 37. *ib.*

iv. *Plate Glass.* - - - § 24.

Malicious Mischief to such in any House, &c. belonging to the Plate Glass Company, Felony and Transportation. *ib.*

12, 13, & 14. *In respect to Highways, Turnpikes, and Bridges.* - - - § 25.

i. *Highways.* Mischief to such punishable as Nuisance at common Law, or on summary Conviction before Justices of Peace by General Highway Act 13 Geo. 3. c. 78. *ib.*

ii. *Turnpikes.*

Destroying *Turnpike Gates*, *Posts*, *Rails*, &c. or *Engines for weighing*, &c. Felony and Transportation, or Imprisonment for 3 Years, by Stat. 13 Geo. 3. c. 84. - - - § 26.

iii. *Bridges.* Nuisances to such punishable as Misdemeanor at common Law, and also by Stat. 13 Geo. 3. c. 78. on summary Conviction for certain petty Injuries. - - - - § 27.

Certain Bridges protected by particular Statutes. *ib.*

15. *To Mines and Engines.* - - - § 28.

Coal Mines.

Burning such, a capital Felony by Stat. 10 Geo. 2. c. 32. *ib.*

General Provisions of the Black Act extended thereto. *ib.*

Drowning such, subjects Party only to treble Damages. *ib.*

Destroying *Engines* for draining Mines of *Coal, Lead, Tin, Copper, or other Mineral,*—or *Bridge, Waggonways, or Trunks* for carrying such, &c. Felony and Transportation. - - - - § 29.

Pulling down, filling up, &c. *Airway, Waterway, Drain, Pit, Level, or Shaft,*—or damaging *Railway, Tram Road, or other Road* to such Mine, &c. a Misdemeanor subject to Imprisonment. - § 30

Extends to *Accessaries before and Aiders. ib.*

Exception in Favour of Owners of adjoining Mines. *ib.*

16. *To Sea Banks and River Banks.* § 31.

Breaking down, &c. such, maliciously, a capital Felony by Stat. 6 Geo. 2. c. 37. *ib.*

General Provisions of Black Act extended to these Offences by Stat. 10 Geo. 2. c. 32. *ib.*

Unlawfully destroying, or taking away from Sea Banks, Piles, Chalk, or other Materials, 20*l.* Penalty on summary Conviction. *ib.*

Summary Jurisdiction given by Stat. 19 Geo. 2. c. 22. as to Rubbish thrown in Harbours, &c. *ib.*

17. *To Locks and other Works on navigable Rivers.* § 32.

Maliciously demolishing such, Felony and Transportation by Stat. 1 Geo. 2. st. 2. c. 19. *ib.*

Returning from Transportation before the Term, ousted of Clergy by Stat. 5 Geo. 2. c. 33. *ib.*

Expences

Expences of Prosecution to be defrayed by the Trust. § 32.

Clergy ousted from principal Offenders and Rescuers by Stat. 8 Geo. 2. c. 20. *ib.*

Trial and *Pardon. ib.*

By stat. 4 Geo. 3. c. 12. the maliciously damaging or destroying Banks, Sluices, or other Works on Rivers made navigable by Act of Parliament; or opening Flood-Gates, &c., or doing *any other wilful Hurt or Mischief to such Navigation*, or *obstructing* the carrying it on or completing it, &c.; is made Felony and liable to Transportation. *ib.*

18. *In respect to Drainage, and Works for the Preservation of particular Places.* - § 33.

i. *Powdike in Marshland*, by Stat. 22 Hen. 8. c. 11. *ib.*

ii. *The Bedford Level*, by Stat. 27 Geo. 2. c. 19. and other Statutes. - - - § 34.

iii. Certain Marshes in Norfolk, by Stat. 42 Geo. 3. c. 22. - - - § 35.

iv. Certain Lands bordering on the Sea in Devon, by Stat. 42 Geo. 3. c. 32. § 36.

19. *To the West-India Docks in the Port of London.* § 37.

Burning any of the Works, or any Vessel lying within them, Felony without Clergy by Stat. 39 Geo. 3. c. 69. *ib.*

Destroying, &c. any such Works, or Vessels, punishable by Fine and Imprisonment, or Transportation. *ib.*

So cutting, &c. or in any Manner destroying any Rope by which any Vessel lying in the docks, &c. *or in any Place in the Thames between London Bridge and the Mouth of the River Lea*, is subjected to Penalty. *ib.*

20. *To*

20. *To the King's Ships, Dock-Yards, Stores, &c.* § 38.

Wilfully firing or otherwise destroying such, Felony without Clergy by Stat. 12 Geo. 3. c. 24. *ib.*

Trial. ib.

21. *To private Ships, Wrecks, &c.* § 39.

Destroying Ships by Master, or Mariners, &c. belonging to such, Felony by Stat. 22 & 23 Car. 2. c. 11. *ib.*

By Stat. 1 Ann. st. 2. c. 9. such Persons wilfully casting away, burning, or otherwise destroying Ships, to the Prejudice of their Owner, or any Merchant having Goods on board, excluded Clergy. *ib.*

Trial reserved to Admiralty, if Offence within its Jurisdiction. *ib.*

Stat. 12 Ann. st. 2. c. 18. provides for assisting Ships stranded, or in danger of being so. *ib.* And that Persons entering such Ships without Leave, or molesting others in saving such, shall make double Satisfaction, to Party grieved, or be sent to House of Correction for 12 Months. - § 40.

Making Holes, or stealing Pumps, or wilfully doing any Thing tending to immediate Loss of Ship, Felony without Clergy. - - § 41.

By 4 Geo. 1. c. 12. if Owner, Master, or Mariner belonging to any Ship, wilfully cast away, burn, or otherwise destroy it—or procure the same to be done, to the Prejudice of Underwriters on the Ship, or Merchants having Goods laden on board, Felony, and ousted of Clergy by Stat. 11 Geo. 1. c. 29. *ib.*

Trial. ib.

Construction on Statutes. - - § 42.

What *a casting away* or *destroying? ib.*

Must be to defraud *Insurer* on the *Ship*, not on *Goods*, within that Branch. *ib.*

One who is Accessary to a felonious Shipwreck is not within Stat. 4 Geo. 1. c. 12. unless he belong to the Ship. *ib.*

But Plunder or Destruction, *by any Person*, of Goods on board Ship in Distress is within Stat. 12 Ann. st. 2. c. 18. - - - § 43.

And they are punishable as *Pirates* by Stat. 8 Geo. 1. c. 24. *ib.*

And by Stat. 26 Geo. 2. c. 19. destroying Effects belonging to Ships in Distress, wrecked, stranded, or cast on Shore, or any Part of *Furniture*, *Tackle*, *Provision*, or *Part of such Ship*,—or *obstructing the Escape* of any Person,—or *putting out false Lights* to bring Ships into Danger, Felony without Clergy. *ib.*

Trial. ib.

By Stat. 2 Geo. 3. c. 28. cutting or damaging Cordage, &c. fixed to Vessels at Anchor or Mooring in the *River Thames*, liable on Conviction to Transportation. - - - § 44.

So obstructing Execution of the Act. *ib.*

The King's Ships wilfully or negligently running down others, or hazarding them, &c. Offenders punishable with Death, or other less Punishment, by a Court Martial. - - - - § 45.

Seamen and others *setting Fire* to any Ship, Keel, or other Vessel, Felony without Clergy by Stat. 33 Geo. 3. c. 67. - - - § 46.

Otherwise destroying or damaging the same, Felony and Transportation. *ib.*

Trial, and *Limitation* of Prosecution. *ib.*

Malicious or Fraudulent Mischief.

I HAVE before adverted to this general class of offences in the introductory part of the last chapter upon arson, which constitutes one of the most prominent of the class. In treating of that offence I had occasion to mention also the burning of buildings of all descriptions, whether forming part of the dwelling-house or otherwise; as also the burning of stacks, &c. of corn, grain, straw, hay, and wood, which are connected with the same subject by several statutes, the construction of which was more properly and conveniently considered

§ 1.

Reference to offences ejusdem generis, under other titles.

Burning of buildings.

Stacks, &c. of corn, straw, hay, and wood.

Vide 2 Term Rep. 255.

Ch. XXII. § 1.

considered together. Malice against the person of the owner seems to be the only probable motive to the commission of all those offences. But it often happens that a violent, lawless, and destructive spirit, however generally attributable to personal malignity and revenge, is often incited by and accompanied with a lust for plunder, regardless of the means, and hardened against the consequences. Some of the offences which remain to be described are of this sort, originating from a mixture of malice and fraud; where the end in contemplation is some undue gain, to be obtained by some violent and destructive means.

Pulling down or beginning to destroy houses, mills, chapels.

Other offences, which might properly be classed under this general head, those of pulling down or otherwise beginning to destroy houses, mills, or chapels, &c. by persons *riotously* assembled, will more conveniently be considered when I come to treat of *Riots*, with which they are particularly connected by the *riot*-act, and other acts in pari materiâ; the riotous assembly of such offenders at the time being a necessary ingredient in the constitution of the offence.

Ripping, breaking, &c. iron or lead, &c. fixed to houses.

So the mere ripping, cutting, or breaking, (if done *with intent to steal*,) of any lead, iron bar, iron gate, iron palisadoe, or iron rail, or of any copper, brass, bell-metal, utensil, or fixture, fixed to any dwelling-house, outhouse, &c. are made substantive offences, though the theft or robbery were not actually accomplished, by the stats. 4 Geo. 2. c. 32. and 21 Geo. 3. c. 68. before set forth in the chapter upon larceny and robbery.

Ante, 590, 1.

Nuisances.

Some few offences of less malignity will be noticed under the head of nuisances, to which they also relate.

Maims.
Ante, 392.

Spoiling clothes.
Ante, 424.

Others again, which are of a personal nature, such as *maims*, have been already mentioned under the head of *Mayhem:* and another of them, that of *spoiling cloaths*, being connected with the personal assault on the wearer, has been treated of under the class of *Assaults*, &c.

Piracy.
Ante, 792.

And Piracy will be found to comprehend other offences of this description.

1. *In*

Ch. XXII. § 2.
In Northern counties.

1. *In the Northern Counties.*

§ 2.
43 Eliz. c. 13.
Vide ante, 430 and 650.

By the stat. 43 Eliz. c. 13., which has been in part before recited, for restraining incursions, robberies, burning of towns, and houses, within the counties of Cumberland, Northumberland, Westmoreland, and the bishoprick of Durham, and the imprisonment and cruel treating of the inhabitants, unless redeeming themselves by great ransoms called blackmail, it is enacted that "whosoever shall at any "time hereafter, without lawful authority, *take* any of the "queen's *subjects* against his or their will, and carry them "out of the same counties, or to any other place within "any of the said counties, or detain, force, or *imprison* *Imprisoning.* "him or them as prisoners, or against his or their wills, to "ransom them, or to make a *prey* or *spoil* of his or their *Making prey or spoil of persons or goods upon deadly feud or otherwise.* "*person* or *goods*, *upon deadly feud or otherwise:* or whosoever "shall be privy, consenting, aiding, or assisting unto any "such taking, detaining, or carrying away, or procure the "taking, &c. of any such person or persons prisoners as "aforesaid: or whoever shall *take*, receive, or carry to the *Taking or giving blackmail.* "use of himself, or wittingly to the use of any other, any "money, corn, cattle, or other consideration, commonly "called blackmail, for the protecting or defending of him "or them, or his or their lands, tenements, goods, or "chattels, from such thefts, spoils, and robberies, as afore-"said: or whosoever shall *give* any such money, &c. called "blackmail, for such protection as aforesaid; or shall wil-"fully and of malice *burn*, or cause to be burned, or aid, *Burning barns or stacks of corn.* "procure, or consent to the burning of any barn or stack *Vide* ante, *Arson*, s. 2. "of corn or grain, within any of the said counties or places "aforesaid: and shall be of the said several offences or any "of them indicted, and lawfully convicted, or shall stand "mute, or challenge peremptorily above 20, before the "justices of assize, gaol delivery, oyer and terminer, or of "the peace, within any of the said counties at some of their "general sessions, &c. shall be adjudged felons, without *Death.* "benefit of clergy."

Authority is given to the Court by a subsequent statute of the 18 Car. 2. c. 3. before noticed, to execute or transport for life certain of these offenders, known in Northumberland and Cumberland by the name of moss troopers.

18 Car. 2. c. 3. Ante, 650. made perpetual by 31 Geo. 3. c. 42. s. 1. *Transportation.*

2. *By*

2. *By Burning Heath, Furze, Fern, &c.*

§ 3.

Burning heath, &c. 4 & 5 W. & M. c. 23.

By stat. 4 & 5 W. & M. c. 23. s. 11. it is "provided and "enacted that for the better preserving the red and black "game of grouse, commonly called heath-cocks or heath-"polts, no person whatsoever, on any mountains, hills, "heaths, moors, forests, chaces, or other wastes, shall "presume to burn, between the 2d of *February* and 24th "of *June*, any grig, ling, heath, furze, goss, or fern, upon "pain that the offender or offenders shall be committed to "the house of correction for any time not exceeding one "month, and not less than ten days, there to be whipped "and kept to hard labour."

Misdemeanor.

This provision is to be found in an act made for the general preservation of game, which in other clauses gives a summary method of prosecution and conviction before one justice of the peace, who, in default of the offender's paying a certain penalty, is enabled to direct the specific punishment above described to be inflicted on him: and it is probable that the same method of proceeding was intended to be applied to offences described in the 11th section. Yet as such summary jurisdiction is not expressly given to justices of peace, the common opinion has been, that the trial and conviction must be at the assizes, or in the superior courts. Though if the fact be wilfully done, there seems no reason why the justices in sessions may not take cognizance of it as a nuisance, or in some cases even as a breach of the peace.

Vide Burn's Justice, tit. *Game*, s. 6.

28 Geo. 2. c. 19. *Summary jurisdiction to inquire and punish.*

The subsequent act of the 28 Geo. 2. c. 19. s. 3. does not affect to repeal the above-mentioned clause; but, merely reciting that the laws then in being were not sufficient to prevent the offences, enacts, "that if any person or persons, "not having a right or legal licence to do the same, shall, "after the 1st of *August*, 1755, set fire to, burn, or destroy, "or shall abet, aid, or assist in or at the burning or destroy-"ing of any goss, furze, or fern (*a*), growing or being in "or upon any forest or chace (*b*) within England, without "the licence or consent of the owner or proprietor, or the "person chiefly entrusted with the care, oversight, and "custody of such forest or chace, or some part thereof," &c. The statute then proceeds to give a summary jurisdiction to one or more justices of the peace, to convict the person

[(*a*) Omitting the word *heath*, which is, however, mentioned in the margin of Runnington's edit. of the Stats.]

[(*b*) Omitting the other general description of places in the stat. of Wm.]

son so offending in a certain penalty, and to commit him to gaol in default of payment for a given time. Ch. XXII. § 3. *By burning heath, &c.*

3. *By Hunters.*

§ 4. *By hunters.*

Although the several statutes against unlawful hunters of deer include many other offences than those which amount in law to larceny; yet as the acquisition of the property is the ultimate end of every species of violence and mischief described by those statutes, I thought that they might with most propriety be treated of under the head of Larceny and Robbery: but since that part of the work was printed, a very recent act of parliament has passed, revising the subject, and again restoring to the class of felonies many of the offences before enumerated, which were formerly made such by the Black Act, but which by the construction put upon the stat. 16 Geo. 3. c. 30. in Davies' case before referred to were reduced to misdemeanors by the latter statute, punishable in the first instance by a pecuniary forfeiture. Ante, 608. 9 Geo. 1. c. 22. Davies' case, ante, 609.

The act in question is the 42 Geo. 3. c. 107. entitled "An act more effectually to prevent the stealing of deer." The first section of which enacts, "that if any person or persons shall wilfully course or hunt, or take in any slip, noose, toil, or snare, or kill, wound, or destroy, or shoot at, or otherwise attempt to kill, wound, or destroy, or shall carry away, any red or fallow deer, kept or being in the inclosed part of any forest, chase, purlieu, or ancient walk, or any inclosed park, paddock, wood, or other inclosed ground, wherein deer are, have been, or shall be usually kept, without the consent of the owner of such deer, or without being otherwise duly authorized, or shall knowingly be aiding, abetting, or assisting therein or thereunto; every person so wilfully offending as aforesaid, in any of the cases above mentioned, shall be deemed and taken to be guilty of felony, and, being lawfully convicted thereof upon indictment, shall be adjudged to be transported for the term of seven years." 42 G. 3. c. 107. *Hunting, &c. or taking in toil, or killing, wounding, or destroying deer in inclosed ground, felony and transportation for seven years.*

Sect. 2. enacts, "that from and after the passing of this act, (26th June 1802,) if any person shall wilfully course or hunt, or take in any slip, noose, toil, or snare, or kill, wound, or destroy, or shoot at or otherwise attempt to kill, *In open ground a misdemeanor, and penalty for first offence.*

Ch. XXII. §4. *By hunters.*

" kill, wound, or destroy, or shall carry away, any red or " fallow deer, kept or being in the uninclosed part of any " forest, chase, purlieu, or ancient walk, without the con- " sent of the owner of such deer, or without being otherwise " duly authorized, or shall knowingly be aiding, abetting, " or assisting therein or thereunto; every person so offending " shall, for every such act of wilful coursing or hunting, " and for every such attempt to kill, wound, or destroy, " and for every deer so taken, or killed, wounded, or de- " stroyed, or shot at, or carried away as aforesaid, in or " from any uninclosed part of any forest, chase, purlieu, " or ancient walk, forfeit and pay the sum of fifty pounds; " and if the offender in any of the cases aforesaid shall be " a keeper of or person in any manner entrusted with the " care or custody of deer in the forest, chase, purlieu, or " ancient walk, wherein the offence shall be committed, " he shall for every such offence forfeit and pay double the " penalty herein-before enacted to be paid by other offen- " ders."

2d offence felony and transportation for seven years.

Sect. 4. enacts, " that if any person or persons, after " having been duly convicted of any offence for which a " pecuniary penalty or forfeiture is imposed, either by this " act or by the said act made in the sixteenth year of the " reign of his present majesty, shall offend a second time by " committing any offence against this act, for which a " pecuniary penalty or forfeiture is herein-before imposed; " such second offence, whether it be the same offence as " the first offence, or be any other of the said offences, " shall be deemed and taken to be a felon, and the person " or persons guilty thereof, being lawfully convicted upon " indictment, shall be adjudged to be transported for the " term of seven years."

First conviction to be recorded.

Sect. 5. enacts, " that the justice before whom any per- " son shall be convicted, for the first time, of any offence " against this act, for which a pecuniary penalty or for- " feiture is imposed, shall transmit such conviction under " his hand and seal to the quarter session which next after " such conviction shall be holden for the county, riding, or " division, city, town, or place, wherein such first offence " was committed, there to be filed by the clerk of the peace " or other proper officer, and kept amongst the records of " the

" the court; and such conviction so filed, or a true copy " thereof, certified by such clerk of the peace or other offi- " cer, or proved to be a true copy, shall be sufficient evi- " dence to prove the conviction for such offence as afore- " said." Ch. XXII. § 4. *By hunters.*

Sect. 6. enacts " that from and after the passing of this " act, so much of the said act made in the 16 Geo. 3. " (c. 30. s. 1.) as imposes or inflicts a penalty, forfeiture, or " punishment, on any person who shall hunt or course, or " take in any slip, noose, toil, or snare, or kill, wound, or " destroy, or shoot at or otherwise attempt to kill, wound, " or destroy, or carry away, any fallow deer in any forest, " chase, purlieu, or ancient walk, whether inclosed or not, " or in any inclosed park, paddock, wood, or other inclosed " ground, where deer were or had been or should be " usually kept, without the consent of the owner, or with- " out being otherwise duly authorized, or who shall be aid- " ing, abetting, or assisting therein, shall, with respect to " the said offences, committed after the passing of this act, " be and the same is hereby repealed." *Repeal of* 16 G. 3. c. 30. s. 1.

By s. 3. the general provisions of the stat. 16 Geo. 3. c. 30. as to the seizing, apprehending, and conviction of offenders, or for recovery, &c. of penalties, &c. and the *time* of bringing actions or *prosecutions*, &c. and as to pleading, and costs, &c. shall, as far as the same respectively are applicable, be in force, in seizing, apprehending, and convicting offenders against this act, and in the recovery, application, and disposal of the penalties, and with respect to the time and manner of appealing from convictions, &c.

By s. 7. this act is not to extend to Scotland or Ireland.

There are however other clauses in the statute 16 Geo. 3. which are still in force, touching these offenders. One against the wilful destruction of pales or walls inclosing deer, which I shall presently notice. 16 Geo. 3. c. 30. Post. s. 11.

Also by s. 9. of the same statute, " If any person or per- " sons carrying any gun, or other fire arms, or any sword, " staff, or other offensive weapon, shall come into any forest, " chace, purlieu, or ancient walk, or into any inclosed " park, paddock, wood, or into any other ground where " deer are usually kept, be the same inclosed or not in- " closed, 16 Geo. 3. c. 30. s. 9. *Carrying arms where deer are kept with intent to hunt, &c. or resisting keepers, &c. felony and transportation.*

Ch. XXII. § 4. *By hunters.*

Vide 39 & 40 Geo. 3. c. 50. as to such acts done with intent to kill game.

" closed, with an intent unlawfully to shoot at, course, or " hunt, or to take in any slip, noose, toil, snare, or other " engine, or to kill, wound, destroy, or take away, any red " or fallow deer; it shall be lawful for every ranger or " keeper, or person entrusted with the care of such deer, to " seize and take from such person and persons, in and upon " such forest, chace, purlieu, ancient walk, park, paddock, " wood, or other ground, to and for the use of the owner " thereof respectively, all such guns, fire-arms, slips, nooses, " toils, snares, or other engines, and all dogs there brought " for coursing deer, in the same and like manner as the " gamekeepers of manors are empowered by law within their " respective manors to seize and take dogs, nets, or other " engines in the custody of persons not qualified by the laws " to keep the same: and if any such person or persons shall " there unlawfully beat, or wound, any ranger or keeper, or " his or their servants or assistants in the execution of his " or their office or offices; or shall attempt to rescue any " person in the lawful custody of any such ranger, keeper, " servant, or assistant; every person so offending shall be " adjudged guilty of felony, and on being lawfully convic- " ted on indictment shall be transported to one of his Ma- " jesty's Plantations in America for the space of 7 years."

Pardon.

Offenders against this act discovering any other offender against the same, so as such offender be duly convicted, shall by s. 17. be discharged of all forfeitures and penalties of the act previous to such discovery. And by s. 25. " Every

Limitation of prosecution.

" prosecution for any offence against this act shall be com- " menced within 12 calendar months, but not after, from " the time of the offence committed." By s. 28. the act is not to extend to Scotland.

4. *In respect to Timber and other Trees, Woods, Coppices, &c. and other Wood in general; Roots, Plants, &c.*

§ 5. *Trees, wood, underwood, &c.*

The next class of offences, relating to the injury or destruction of timber, and other trees, woods, underwoods, &c. has engaged much of the attention of the Legislature at different periods, and some confusion has arisen for want of a more connected and general view of the subject. I shall first

first give the principal statutes in order of time, and then point to the leading distinctions to be observed in them. Ch. XXII. § 5. *Timber, wood, &c.*

By the stat. 37 Hen. 8. c. 6. "If any person or persons "maliciously, willingly, or unlawfully bark any apple trees, "pear trees, or other fruit trees of any other person or per- "sons, every such offender shall not only forfeit unto the "party grieved treble damages for such offence or offences, "the same to be recovered by action of trespass, but also "shall forfeit to the King 10*l.* in the name of a fine." 37 H. 8. c. 6. *Vide* ante. *Barking fruit trees, treble damages, and fine.*

The stat. 1 Geo. 1. st. 2. c. 48. after providing that if any person shall maliciously break down, cut up, pluck up, throw down, bark, or otherwise destroy, deface, or spoil any timber tree or trees, fruit tree or trees, "or any other tree "or trees," the party injured shall recover damages against the inhabitants of the parish, vill, &c. or place where such tree, &c. shall be so maliciously broken down, &c. in the same manner and form as damages are to be yielded for hedges and dikes overthrown by persons in the night by the stat. 13 Ed. 1. st. 1. c. 46.; and providing (s. 2.) for the conviction and punishment of the offenders for the trespasses and offences aforesaid by two or more justices of the peace in or out of Sessions; and reciting (s. 4.) that "whereas "divers woods, underwoods, and coppices have been here- "tofore and lately set on fire, or burnt, to the great dis- "couragement of planting; enacts and *declares*, that if any "person or persons shall after the 24th of June 1716 ma- "liciously set on fire or burn, or cause to be burnt, any "wood, underwood, or coppice, or any part thereof, such "malicious setting on fire, burning, or causing to be burnt, "shall be and is hereby declared and made felony; and the "offender and offenders shall suffer and be liable to all the "penalties and forfeitures as other felons by the law now "are." *Damages against the parish, &c. where fruit trees, timber, or other trees destroyed.* 1 G. 1. st. 2. c. 48. *Burning wood, underwood, and coppices, felony.* *Vide* st. 7 Ann. c. 21. as to Scotland.

Offences of this nature were before this treated only as trespasses and misdemeanors by several statutes. And soon after the passing of the above law another act passed, the recital and provisions of which are not easily to be reconciled with the 4th clause of it, except upon the ground hereafter suggested with respect to the black act. *Vide* st. 35 H. 8. c. 17. 43 Eliz. c. 7. 15 Car. 2. c. 2. and 22 & 23 Car. 2. c. 7.

The

Ch. XXII. § 5. *Timber, wood, &c.*

6 Geo. 1. c. 16. *Extending damages against parish, &c. for destruction of woods, &c. and fences and inclosures of the same, whether done by day or night.*

The stat. 6 Geo. 1. c. 16. entitled, "An act to explain "and amend" the former act, reciting certain mischiefs after mentioned; and that "some doubts have arisen whether the offences committed *in the day-time* mentioned in "that act are punishable by the said act. And whereas "there is no provision made in the said act for punishing "the offences committed by persons who shall break open, "throw down, level, or destroy the hedges, gates, posts, "stiles, railing, fences, ditches, banks, walls, or other in-"closures of such woods, wood grounds, plantations, and "coppices: therefore, for the explaining and amending the "said act, and for remedying the several mischiefs herein-"before mentioned, and for the better preserving of all such "wood springs, or springs of wood, poles, quick-woods, "plantations, underwoods, coppice woods, gates, posts, "stiles, railing, fences, hedges, walls, and other inclosures "of woods, from being unlawfully cut, taken, spoiled, "broken, burnt, destroyed, defaced, or carried away; and "for the better discovering and more effectual punishment "of such offenders therein, their aiders and abettors; and "for the providing satisfaction for the damages the respec-"tive proprietors thereof shall sustain thereby," enacts, "that if any person or persons after the 24th of June 1720 "shall either by day or by night cut, take, destroy, break, "throw down, bark, pluck up, *burn*, deface, spoil, or carry "away, any wood springs or springs of wood, trees, poles, "*wood*, tops of trees, *underwoods*, or *coppice woods*, thorns, "or quicksets, without the consent of the owner of such "woods, wood grounds, parks, chaces, or coppices, planta-"tions, timber trees, fruit trees, or other trees, thorns, or "quicksets, or of the persons chiefly entrusted with the care "and custody thereof; or shall break down, throw down, "level, or destroy any hedges, gates, posts, stiles, railing, "walls, fences, dikes, ditches, banks, or other inclosures of "such woods, wood ground, parks, chaces, or coppices, "plantations, timber trees, fruit trees, or other trees, "thorns, or quicksets," the party grieved shall recover damages against the parish, &c. in the same manner and form as for dikes and hedges overthrown by persons *in the night*, or at another season when they suppose not to be espied, as is provided by the stat. 13 Ed. 1. st. 1. c. 46.

Then

Ch. XXII. § 5. *Timber, wood, &c.*

Then by s. 2. it is further "enacted and *declared*, that "if any person or persons, at any time after the said 24th "of June, in a riotous, open, tumultuous, or in a secret and "clandestine manner, forcibly, or wrongfully, and *malici-* "*ously*, and without the consent of the proprietor, wood- "reeve, wood-keeper, or person chiefly intrusted with the "care, oversight and custody of such *woods*, *wood-grounds*, "parks, chaces, *coppices* or plantations, shall cut down, de- "stroy, break, bark, throw down, *burn*, take, deface, spoil, "or carry away, any *wood* or springs of *wood*, *underwood*, or "*coppice wood*; or shall in such a riotous, forcible, tumul- "tuous, secret, or clandestine manner as aforesaid, malici- "ously break open, throw down, level or destroy any "hedges, gates, posts, stiles, rails, fences, ditches, banks, or "inclosures of such woods, wood grounds, coppices, planta- "tions, timber trees, fruit trees, or other trees, thorns, or "quicksets; that then it shall and may be lawful to and "for any two or more justices of the peace of the county, "&c. wherein any such offence or offences shall be com- "mitted, or for the justices in open sessions, upon complaint "to them made by any inhabitant of the aforesaid parish, "&c. or place, or of the owner of such tree or trees, "woods, wood grounds, parks, chaces, coppices, or plan- "tations, or of any other, to cause such offender or offen- "ders to be apprehended for the *trespasses* and offences "aforesaid, or any of them, and to hear and finally deter- "mine and adjudge all and every the offence and offences "aforesaid. And if such justices shall convict any person "or persons of all or any of the trespasses and offences afore- "said, then such justices, immediately after such convic- "tion, shall and are hereby required to inflict *all and every* "*the same penalties and punishments in the said act of the first* "*Geo.* 1. *herein-before mentioned*, as fully and largely, and in "the same manner, for all and every the crimes and "offences herein-before expressed, although not contained "in the said act, as if the same were here again repeated "and re-enacted."

Destroying woods, underwoods, coppices, plantations, trees, &c. inquirable by justices of peace, and punishable as under stat. 1 Geo. 1. st. 2. c. 48.

In like manner the stat. 29 Geo. 2. c. 36. which enables the proprietors of wastes, woods, and pastures, wherein any others have common of pasture, with the assent of the major part in number and value of the owners, &c. to in-

close

Ch. XXII. § 5. *Timber, wood, &c.*

close the same for the growth and preservation of timber or underwood, and gives an appeal in certain cases to the parties grieved, by

29 Geo. 2. c. 36. s. 6. *Damages against the parish, &c. extended to trees in new inclosures.*

Sect. 6. enacts, that "if any person, from and after the "time hereby limited for bringing such appeal against any "such agreement for the inclosure of any part of such "wastes, woods, or pastures, shall either by day or by night "unlawfully cut, take, destroy, break, throw down, bark, "pluck up, burn, deface, spoil, or carry away, any trees "growing within such inclosure, without the consent of the "owner or owners thereof, such owner or owners shall have "such remedy, and have and receive such satisfaction and "recompence of and from the inhabitants of the parishes, "&c, or places adjoining to such inclosures, and recover "such damages against the inhabitants of such parishes, "&c. and in the same manner and form, as is directed for "dikes and hedges overthrown by the said act made in the "13th Edward I.; unless the offender or offenders shall be "convicted of such offence within the space of six months "next after the commission thereof." And then by s. 7. "It shall and may be lawful for any two justices of the "peace of the county, &c. wherein any such offence shall "be committed, or for the justices in sessions, &c., upon "complaint to them made, to cause every such offender to "be apprehended for such *trespass*, and to hear and deter- "mine the same, and to inflict the like penalty and punish- "ment on every offender by them convicted as is directed "to be inflicted on offenders by the stat. 6 Geo. 1. c. 16." And by s. 8. "If any person after the 1st of July 1756 shall "unlawfully cut, take, destroy, break, throw down, bark, "pluck up, burn, deface, spoil, or carry away, any tree "growing in any waste, wood, or pasture in which any "person or persons, or body or bodies politic or corporate, "have right of common, every such offender shall and may "be in like manner convicted of such offence, and shall in- "cur the like penalty."

Vide the explanatory act of 31 Geo. 2. c. 41. *and jurisdiction of such trespasses given to justices of peace as under stat.* 6 Geo. 1. c. 16.

§ 6. *Construction of statutes.*

Upon these provisions it may be observed, that although the doubt recited in the preamble of the stat. 6 Geo. 1. c. 16. seems principally to refer to the offences mentioned in the first section of the stat. 1 Geo. 1. st. 2. c. 48., which were made

made punishable by the second section as trespasses upon summary conviction before two magistrates; and not to relate to the offences declared to be felony by the 4th section of the last-mentioned statute; because the doubt there expressed could have no reference to such 4th section; yet the offences described in that section seem to be, in part at least, included in the 2d section of the stat. 6 Geo. 1. c. 16. wherein they are again treated as *trespasses*, and subjected to the summary jurisdiction of two magistrates. But what is more remarkable, such justices of the peace have power given them to inflict "*all and every the same penalties and punishments* in the said act of the 1 Geo. 1. therein before mentioned, as fully and largely, and in the same manner, *for all and every the crimes and offences herein before expressed*, although not contained in the said act, as if the same were here again repeated and re-enacted." Yet it is hardly to be imagined that the Legislature meant to enable two justices of the peace out of sessions to convict a person of felony, or to subject a person to the pains and penalties of felony for any offence which as a trespass is referred to the cognisance of such summary jurisdiction.

Ch. XXII. § 6. *Timber, wood, &c.*

§ 7.

Again, by the Black Act 9 Geo. 1. c. 22. s. 1. "If any person or persons (whether armed or disguised as mentioned in the preceding part of the clause, or not) shall unlawfully and maliciously cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit; or shall forcibly rescue any person being lawfully in custody of any officer or other person for any the offences before mentioned; or if any person or persons shall by gift or promise of money or other reward procure any of his majesty's subjects to join him or them in any such unlawful act; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony without benefit of clergy."

9 Geo. 1. c. 22. s. 1. *Unlawfully and maliciously destroying ornamental, useful, or profitable trees in avenues, &c. a capital felony.*

By s. 14. the trial may be in any county in England; and this is at the option of any private prosecutor.

Ante, tit. *Arson*, and 2 Blac. Rep. 733.

This act was made perpetual by stat. 31 Geo. 2. c. 42.

The subsequent statute of the 6 Geo. 3. c. 36. (which takes no notice of the last-mentioned law) after reciting that "divers

6 Geo. 3. c. 36. *Destroying or spoiling of timber*

Ch. XXII. §7. *Timber, wood, &c.* "divers persons have of late years *wilfully and maliciously* cut down, barked, or otherwise destroyed, timber trees, and trees standing for and likely to become timber, growing as well in the several forests, chaces, and other open grounds, as in the woods, and plantations, and inclosed grounds, within this kingdom, to the great detriment of the owners of such trees, and to the discouragement of planting," &c.; and reciting further the practice of plundering nursery grounds, &c. of valuable roots, shrubs, and plants; enacts, "that after the 2d of June 1766 all and every person and persons who shall *in the night-time* lop, top, cut down, break, throw down, bark, *burn*, or *otherwise spoil* or *destroy*, or carry away, any oak, beach, ash, elm, fir, chesnut, or asp, timber tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner or owners thereof first had and obtained; or shall *in the night-time* pluck up, dig up, break, spoil, or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants, of the value of 5*s*., and which shall be growing, standing, or being in the garden ground, nursery ground, or other inclosed ground of any person or persons whomsoever, shall be deemed and construed to be guilty of felony; and every such person or persons shall be subject and liable to the like pains and penalties as in cases of felony: and the Court before whom such person or persons shall be tried, shall and hereby have authority to transport such person or persons for seven years to any of his majesty's plantations in America, in like manner as other felons are directed to be transported by the laws and statutes of this realm. And all and every person and persons who shall be *wilfully* aiding, abetting, or assisting in such cutting down, breaking, throwing down, barking, burning, or otherwise spoiling, or destroying, or carrying away, any such oak, beach, ash, elm, fir, chesnut, or asp, timber tree, or other tree or trees standing for timber, or likely to become timber, as aforesaid; or in such plucking up, digging up, cutting, breaking, spoiling, or destroying, or carrying away, such root, shrub, or plant, roots, shrubs, or plants, as aforesaid, of the value aforesaid; or who shall buy or receive such root, shrub, or plant, roots, &c. of the value aforesaid,

trees, or trees likely to become such, in open or inclosed grounds, a simple felony.

Extended to root, shrub, or plant, of 5s. value. Vide post. 6 Geo. 3. c. 48.

Transportation for seven years.

Aiders and abettors.

Timber, wood, &c.

"aforesaid, knowing the same to be stolen, shall be subject "and liable to the same punishment as if he, she, or they "had stolen the same, any law to the contrary in any wise "notwithstanding."

The name of the owner of the trees must be truly stated in the indictment, otherwise it is fatal.

R. v. Patrick and Pepper, O. B. Feb. 1783, cor. Buller J. and Perryn B. 1 Leach, 287.

By another act passed in the same session of parliament, "Every person who shall *wilfully* cut or break down, bark, "burn, pluck up, lop, top, crop, or otherwise deface, de- "mage, spoil, or destroy, or carry away, any timber tree or "trees, or trees likely to become timber, or any part there- "of, or the lops or tops thereof, without the consent of the "owner or owners thereof first had, or in any of his ma- "jesty's forests or chaces, without the consent of the sur- "veyor or surveyors, or his or their deputy or deputies, or "person or persons entrusted with the care of the same," shall on conviction before one or more justices of the peace for the first offence forfeit not exceeding 20*l.*, together with the charges of such conviction, &c., and on non-payment to be committed to the common gaol not exceeding 12 nor less than 6 months, or until the penalty and charges be paid: for 2d offence a sum not exceeding 30*l.* and charges, and on non-payment to be committed not exceeding 18 months nor less than 12 months, or until the penalty and charges shall be paid; "and if any person so convicted shall be "guilty of the like offence a third time, and shall be thereof "convicted in like manner (*a*), such person shall be deemed "guilty of felony; and the Court before whom he shall be "tried shall and hereby have authority to transport such "person or persons for 7 years to any of his majesty's plan- "tations in America, in like manner as other felons are "directed to be transported by the laws and statutes of this "realm."

6 Geo. 3. c. 48. *Spoiling or destroying timber trees, &c.; for 1st offence fine and imprisonment; felony and transportation for 2d offence.*

By s. 2. "All oak, beech, chesnut, walnut, ash, elm, cedar, "fir, asp, lime, sycamore, and birch trees, shall be deemed "and taken to be timber trees within the true meaning "and provision of *this* act." To which the stat. 13 Geo. 3, c. 33. adds "poplar, alder, larch, maple, and hornbeam," in the same manner as if inserted in the lastmentioned act.

13 Geo. 3. c. 33.

(*a*) *Vide* the observation on the words "*in like manner*," ante, 590.

Again,

Ch. XXII. § 7. *Timber, wood, &c.*

Again, the 3d section of the stat. 6 Geo. 3. c. 48. enacts also generally, "that after the 24th of June 1766 all and "every person who shall pluck up, or cut, spoil, or destroy, "or take or carry away, any root, shrub, or plant, roots, "shrubs, or plants, out of the fields, nurseries, gardens, or "garden-grounds, or other cultivated lands of any person "or persons whomsoever, without the consent of the owner "or owners thereof first had, and shall be thereof convicted, "&c. before any one or more justice of the peace, &c. "shall for the first offence forfeit such sum as to the justice, "&c. shall seem meet, not exceeding 40*s.*, together with "the charges, &c.; for the second offence a sum not ex- "ceeding 5*l.* together with the charges, &c.; and if any "person so before convicted shall a third time commit the "like offence, and shall be thereof convicted, such person "so convicted shall for such third offence be deemed guilty "of felony, and the Court before whom he shall be tried "shall and hereby have authority to transport such person "for 7 years to any of his Majesty's plantations in America, "in like manner as other felons are directed to be transport- "ed by the laws and statutes of this realm."

6 Geo. 3. c. 48. *Plucking up, spoiling, or destroying roots, shrubs, or plants in cultivated lands; 1st and 2d offence a penalty, 3d offence felony, transportation.* *Vide* ante.

s. 4. *Cutting, splitting, spoiling, damaging, or destroying, &c. any kind of wood, underwood, poles, sticks of wood, green stubs, &c.*

Also by s. 4. of the same act, reciting "that disorderly "persons have made a practice of going into the woods, "underwoods, and wood-grounds of others, and there cut "and carried away great quantities of young wood of vari- "ous kinds, for making of poles and walking-sticks, and "various other uses; and in beech and other woods and "underwoods, under pretence of getting firewood, have "cut down, boughed, split off, or otherwise damaged or "destroyed the growth of the said woods, &c.; and that "the laws in being were not sufficient to remedy the evil;" it is enacted "that all and every person and persons who "after the 24th of June 1766 shall go into the woods, un- "derwoods, or wood-grounds of any of his Majesty's sub- "jects, not being the lawful owner or owners thereof, and "shall there cut, lop, top, or spoil, split down, or damage, "or otherwise destroy, any kind of wood or underwood, "poles, sticks of wood, green stubs, or young trees, or carry "or convey away the same," or shall have the same in their custody, and shall not give a satifactory account how they came by the same, and shall be thereof convicted before one

or having same in custody, without good account, misdemeanor.

or

or more justices of the peace, &c.; shall for the first offence forfeit a sum not exceeding 40*s.* with the charges, &c.; for the second offence a sum not exceeding 5*l.* and charges, &c.; and for the third offence shall, being duly convicted thereof according to law, be deemed an incorrigible rogue, and shall be punished as such. Ch. XXII. § 7. *Timber, wood, &c.*

§ 8. *General view of the several statutes.*

It is extraordinary that the two acts of the 6 Geo. 3. c. 36. and c. 48. should have passed in the same session of parliament upon the same subject matter, without any reference to each other, enacting such different provisions. This distinction however was before remarked between them on another occasion, that if any of the offences therein mentioned be committed *in the night-time*, it is felony by the first-mentioned act; otherwise it is no more than a misdemeanor punishable in the manner described in the second act, except upon a third offence after two former convictions, in which case also it is made felony by the second act. In the case of Hitchcock and Howe there referred to, the Judges held it to be discretionary in the Court to pass sentence of transportation on the offender under the first act, or any other sentence which could be passed for a single felony, or to superadd transportation to the latter.

Ante, tit. *Larceny*, 588, 9.

R. v. Hitchcock and Howe, MS. Jud. Ante, 588.

It is no less singular that the offences created by the Black Act before described should be altogether overlooked in the latter statutes (*a*), the wording of which approximates so nearly to the Black Act, and though the offences created by the latter statutes are so much less penal than those named in the other. The offences in the Black Act, which consist in "cutting down, or otherwise destroying any *trees* planted "in any *avenue* or growing in any *garden*, *orchard*, or *planta*-"*tion*, for *ornament*, *shelter*, or *profit*," must be charged to be done "*unlawfully and maliciously*," in the words of the act: these words are not to be found in the enacting part of the stat. 6 Geo. 3. c. 36. which describes the acts therein prohibited to be done in general terms; but the words "*wilfully and maliciously*" are annexed to the description of the same offences described in the preamble; and therefore

Ante, 1057.

Vide ante, 638.

(*a*) The only reference to the Black Act is in s. 9. of the stat. 29 Geo. 2. c. 36. which was to obviate any conclusion that the remedies given by stats. 1 & 6 Geo. 1. against the parish, &c. for damages were intended to be repealed by the Black Act giving a like remedy against the hundred.

it

Ch. XXII. § 8. *Timber, wood, &c.*

Ante, 598. 615. and tit. *Arson*, (22 & 23 Car.), and *vide* Hassel's case, 1 Leach, 1.

it may be doubtful whether they do not enter into the necessary description of the offences enacted: and the word *wilfully* is expressly inserted in the enacting part of the corresponding statute of the 6 Geo. 3. c. 48.; and also in that part of the stat. 6 Geo. 3. c. 36. which respects aiders and abettors. Also the Black Act has the word *trees* in the plural, whereas the latter statutes have the words "*tree* or *trees*." But it may be doubtful whether the former expression may not be construed *singulariter*, as other statutes in the plural have been sometimes interpreted where the sense pointed to it. Besides which the Black Act extends to "*any* trees," in the places there pointed out; whereas the statutes of the 6th of Geo. 3. are confined to *timber* trees or *trees standing for and likely to become timber*. These latter however comprehend all such trees growing not only in open grounds but in "woods, "*plantations*, and *inclosed grounds*," as stated in the preamble, which general description seems to cover the more particular description of places mentioned in the Black Act. But the most important distinction of all is, I apprehend, the view and intent of the Black Act contrasted with the other statutes. Supposing that the words "*wilfully and maliciously*" which occur in the preamble of the stat. 6 Geo. 3. c. 36. of which the first only is used in the enacting part of the stat. 6 Geo. 3. c. 48. are a descriptive part of the offence under those statutes, yet the whole scope of those statutes, which were intended for the protection of the property itself from depredation, shews that the word *maliciously* is only to be taken in its most general signification, as denoting an unlawful and bad act, an act done malo animo from an unjust desire of gain, or a careless indifference of mischief. Whereas, in order to bring an offender within the penalty of death under the Black Act, the *malice* must be personal against the *owner* of the property. This has been expressly holden with respect to the offence of killing, maiming, or wounding cattle; and the two offences are described in the same paragraph of the clause, and must therefore have the same construction. The words run thus: "If any person or persons "shall unlawfully and maliciously kill, maim, or wound "any cattle, or cut down or otherwise destroy any trees "planted in any avenue," &c. And perhaps the same distinction was in the contemplation of the Legislature, when they made the 4th clause of the stat. 1 Geo. 1. st. 2. c. 48.

c. 48. and when they afterwards passed the subsequent act of the 6 Geo. 1. c. 16. followed up by the two statutes in the 6 Geo. 3.; more particularly when that 4th clause, considered by Mr. Justice Blackstone to be still in force, is viewed as contrasted with the 1st and 2d clauses of the same statute, which are ejusdem generis with those subsequent statutes: and this construction can alone reconcile all the several provisions.

Ch. XXII. § 8. *Timber, wood, &c.*

4 Blac. Com. 245.

By stat. 37 Hen. 8. c. 6. " If any person or persons " maliciously, willingly, or unlawfully do burn or cause to " be burned any heap or heaps of wood of any other per- " son or persons, prepared, cut, and felled, or to be prepared, " cut, or felled, for making of coals, billets, or talwood; " then every such offender and offenders shall not only " lose and forfeit unto the party greived treble damages for " such offence or offences, (the same to be recovered by ac- " tion of trespass,) but also shall forfeit to the King for every " such offence 10*l.* in the name of a fine."

§ 9.

37 H. 8. c. 6. *Burning heaps of wood prepared for making coal, &c.*

The offence herein described seems by the preamble to be pointed at such as commit it from a motive of malice to the owner of the property; for it recites that " malicious and " *envious* persons being men of evil and perverse disposi- " tions, &c. *and minding the hurt, undoing, and impoverish- " ment of true and faithful subjects*, have of late invented a " new damnable kind of vice, &c. and damnifying of the " King's true subjects, &c. in commiting such and such " offences."

5. *Burning Wains or Carts laden with Goods.* § 10.

The last mentioned statute subjects to the same punishment " any person or persons who shall maliciously, wil- " fully and unlawfully burn or cause to be burned any wain " or cart laden or to be laden with coals or any other goods " or merchandizes of any other person or persons."

37 H. 8. c. 6. *Burning carts laden with goods.*

6. *Destroying Fences and Inclosures.* § 11.

Some provisions against the destruction of the fences of wood grounds have been already adverted to in the stat. 6 Geo. 1.

Fences and inclosures. Ante, s. 5.

Ch. XXII. § II. *Fences and inclosures.*

6 Geo. 1. c. 16. which refers to the remedy provided by the stat. 13 Ed. 1. st. 1. c. 46. This latter ordains, that "where "one having right to approve doth then levy a dike or a "hedge, and some by night, or at another season when they "suppose not to be espied, do overthrow the hedge or dike, "and it cannot be known by verdict of the assize or jury "who did overthrow the hedge or dike; and men of the "towns near will not indict such as be guilty of the fact, "the towns near adjoining shall be distrained to levy the "hedge or dike at their own cost, and to yield damages."

13 Ed. 1. st. 1. c. 46.

Damages to be recovered against the adjoining towns for hedges, &c. overthrown.

2 Inst. 476.

This presumes the offence to be indictable; and Lord Coke says, that the indictment is to be either of a riot, force, or trespass; and that no particular time being appointed for the next towns round about adjoining to indict the misdoers, the law appoints a year and a day for that purpose; and by the indictment the lord shall know against whom to bring his action. But the latter opinions seem to be, that the towns must indict the misdoers within a convenient time; otherwise upon the return of a writ of noctanter a distringas shall issue against the inhabitants, though within a year and a day.

Vide Creswick's case, Skin. 94. Dean Forest case, Cro. Car. 280. R. v. Epworth, &c. ib. 439. and ib. 580.

9 Geo. 3. c. 29. s. 3. *Destroying inclosures made under act of parliament.*

By stat. 9 Geo. 3. c. 29. s. 3. "If any person or persons "shall after the 1st of July 1769 wilfully or maliciously set "fire to, burn, demolish, pull down, or otherwise destroy "or damage, any fence or fences that are or shall be erected, set up, provided, or made, for dividing or inclosing any "common, waste, or other lands or grounds, in pursuance "of any act or acts of parliament; every such person be"ing lawfully convicted of any or either of the said several "offences, or of causing or procuring the same to be done, "shall be adjudged guilty of felony, and shall be subject to "the like pains and penalties as in cases of felony; and "the Court before whom such person shall be tried shall "have authority to transport such felon for 7 years, in like "manner as other felons," &c. The prosecution to be commenced within eighteen months after the offence committed, by s. 4.

16 Geo. 3. c. 30. s. 8. *Destroying pales, &c. where deer are kept.*

By stat. 16 Geo. 3. c. 30. s. 8. "If any person or per"sons shall at any time wilfully pull down or destroy, or "cause to be wilfully pulled down or destroyed, the pale or "pales, or any part of the walls of any forest, chase, park "lieu,

" lieu, antient walk, park, paddock, wood, or other ground " where any red or fallow deer shall be then kept, without " the consent of the owner or person chiefly intrusted with " the custody thereof, or being otherwise duly authorised; " every person so offending shall be subject to the forfei- " ture and penalty hereby inflicted for the first offence of " killing any deer;" that is, he shall forfeit 30*l.* on conviction before one justice of the peace, who in case of non-payment of such penalty has (by s. 12.) power to commit. By s. 25. the prosecution must be commenced within 12 calendar months after the offence committed.

Ch. XXII. § 11. *Fences and inclosures.*

Offenders of this description were also subjected to treble damages to the party grieved, and to imprisonment for three months and finding sureties for seven years, by the stat. 5 Eliz. c. 21.

5 Eliz. c. 21.

7. *Breaking down Mounds of Fish Ponds.* § 12.

The property of fish in ponds and other inclosed waters is protected both at common law and by several statutes in the manner already shewn. The following provision of the Black Act was made with a view to protect the owner of this species of property from the malicious resentment of others, who were disposed not so much to benefit themselves by stealing the property, as to injure him by the destruction of it. Wherefore it is enacted, that " if any person or " persons" (whether armed or disguised or not) " after the " 1st of June 1723 shall unlawfully and maliciously break " down the head or mound of any fish pond, whereby the " fish shall be lost or destroyed; or shall forcibly rescue any " person being lawfully in custody of any officer or other " person for any such offence; or if any person or persons " shall by gift or promise of money or other reward procure " any of the King's subjects to join him or them in any " such unlawful act; every person so offending, being " thereof lawfully convicted, shall be adjudged guilty of " felony without benefit of clergy."

Fish ponds.

Ante, s. 10. tit. *Larceny, &c.*

9 Geo. 1. c. 22. made perpetual by st. 31 Geo. 2. c. 42.

Breaking down the head or mound of any fish pond a capital felony.

Clergy is also ousted from offenders not surrendering themselves upon proclamation; and from such as conceal, aid, abet, or succour them after the time expired for their surrender.

Vide tit. *Process to bring in the party.*

Ch. XXII. §12. *Fish ponds.*

By s. 14. the offender may be tried in any county in England at the option of the prosecutor.

Trial, vide ante, 1057.

This statute has in part superseded the use of the stat. 37 H. 8. c. 6. s. 4. by which it was enacted, "That if any "person or persons maliciously, wilfully, and unlawfully "cut or cause to be cut out of the head or heads, dam or "dams of any ponds, pools, motes, stews, or other several "waters, or the head or heads, pipe or pipes, of any con-"duit or conduits of any other person or persons; every "such offender shall not only forfeit unto the party grieved "treble damages, to be recovered by action of trespass, but "shall also forfeit to the King for every such offence 10*l.* "in name of a fine." The act must be done from malice to the owner as it seems from the preamble before stated.

37 H. 8. c. 6. *Cutting heads or dams of ponds, &c. or other several waters; or heads or pipes of conduits.*

Ante, 1063.

5 Eliz. c. 21. *Breaking, &c. heads or dams of ponds, &c. to steal fish, imprisonment for three months and treble damages.*

Also the stat. 5 Eliz. c. 21. reciting that persons had made ponds, &c. and stored the same with fish, &c. and that the said several waters, grounds, &c. had not only by night been broken and entered into, "but also the heads "or dams of the said ponds, &c. or several waters have "been maliciously, wilfully, and unlawfully cut out, and "the fish taken, destroyed, carried away, and *stolen*, to the "great loss and damage of the owners, and the encourage-"ment of the offenders, &c.;" for remedy thereof enacts, "That if any person or persons shall by day or night un-"lawfully, without authority, break, cut down, cut out, or "destroy, any head or heads, dam or dams, of any ponds, "pools, motes, stagnes, stews, or several pits, wherein fish "are or shall happen to be put in or stored withal, by the "owners or possessioners thereof, or do or shall wrongfully "fish in any of the said several ponds, &c. to the intent to "destroy, kill, take, or steal away any of the same fish, "against the will of the owners or possessioners of the same, "not having any lawful title or authority so to do; and "thereof be lawfully convicted at the suit of the Queen, "&c. or the party grieved; he or they shall suffer imprison-"ment for three months, and pay the party grieved treble "damages; and after the said three months expired shall "find sureties for good behaviour for seven years after, or "else remain in prison till such sureties be found for the "said seven years." By s. 6. the justices of oyer and ter-miner and of assize in their circuits, and justices of the peace and

and gaol delivery in their sessions, have authority to hear and determine the same. And by s. 8. the said justices may on the confession of the offence by the party, and his satisfying the party grieved, release the party and his sureties from their recognisance, &c.

Ch. XXII. § 12. *Fish ponds.*

Thomas Ross was indicted on the stat. 9 Geo. 1. c. 22. for unlawfully, maliciously, and feloniously breaking down the head and mound of two fish ponds, in a place called Bosworth Park, beloning to Sir Wolston Dixie, Bart. *whereby the fish therein were lost and destroyed.* It was proved that a part of the head or mound of one of the ponds had been cut down to a considerable depth by two persons, of whom the prisoner was one, so as to leave but little water in the pond, and that the fish were gone. But it appeared to have been the object of the offenders to *steal* the fish, and not to let them escape through the breach in the mound. For the weeds were much trodden down in the pond, manifestly in searching for the fish; and the two persons had been seen with sacks, which there was evidence sufficient to prove were filled with fish; and there was no evidence to shew that any of the fish had escaped through the cut, or that it was the occasion of their loss or destruction any otherwise than by rendering it more easy to take them when the greatest part of the water was let off. Chambre B. at the first was inclined to think, that though the prisoner might have been indicted for a misdemeanor under the stat. 5 Geo. 3. c. 14., the case proved did not support the indictment for the felony, conceiving that the stat. 9 Geo. 1. was meant to apply only to cases of malicious mischief, and when the breaking of the mound was the immediate cause of the loss and destruction of the fish, and not merely auxiliary to the destruction of them by other means: but not recollecting any case upon the construction of this clause, he left the evidence of the facts to the jury, who found the prisoner guilty; and he respited judgment in order to take the opinion of the Judges upon the question of law. In Trin. term 1800 the Judges on conference held the conviction wrong, as the clause against breaking the heads, &c. of ponds does not extend to cases where the object of the party was to steal the fish; which is guarded against by another clause. And that even if the offence proved had been originally within

Ross's case, Leicester Sp. Ass. 1800, cor. Chambre B. MS. Jud. *The breaking down the head or mound of a fish pond with a view of letting the water out, in order more effectually to steal the fish, is not an offence within the stat. 9 Geo. 1. c. 22. which makes the unlawfully and maliciously breaking down such head, &c. whereby the fish shall be lost or destroyed, a capital felony.*

Ch. XXII. § 12. *Fish ponds.* within the Black Act, it was virtually taken out of it by the subsequent statute of the 5 Geo. 3. c. 14.

Vide ante, 611. Perhaps the abovementioned statute of the 5 Eliz. which was not adverted to upon that occasion, may also be thought to meet the case so far as concerns the act of cutting the dam with intent to steal the fish.

§ 13. ### 8. *Cutting Hop-binds.*

Maliciously cutting hop-binds in plantations. 6 Geo. 2. c. 37. s. 6. *This, as well as the Black Act,* 9 Geo. 1. c. 22. *is made perpetual by st.* 31 Geo. 2. c. 42. s. 2 & 4. 10 Geo. 2. c. 32. *extending other provisions of the Black Act to this.*

By stat. 6 Geo. 2. c. 37. s. 6. "If any person or persons "after the 24th of June 1733 shall (during the continu- "ance of the stat. 9 Geo. 1. c. 22.) unlawfully and mali- "ciously cut any hop-binds growing on poles in any planta- "tion of hops; every person or persons so offending, being "thereof lawfully convicted, shall be adjudged guilty of "felony, without benefit of clergy." And by stat. 10 Geo. 2. c. 32. s. 4. "all the provisions made in the stat. 9 Geo. "1. c. 22. for the more speedy and easy bringing the of- "fenders against the said act to justice, and the persons "who shall conceal, aid, abet, or succour such offenders, "and for making satisfaction and amends to all and every "the person and persons, their executors and administra- "tors, for the damges they shall have sustained or suffered "by any offender or offenders against the said act, and for "the encouragement of persons to apprehend and secure "such offender and offenders, and for the better and more "impartial trial of any indictment or information which "shall be found, commenced, or prosecuted for any of the "offences committed against the said act; together with "all restrictions, limitations, and mitigations by the said act "directed; shall during the continuance of the said act "extend to, and be of force and effect in all cases of "offences committed by unlawfully and maliciously cutting "any hop-binds growing on poles in any plantation of "hops."

§ 14. ### 9. *Obstructing the Passage of Grain.*

36 Geo. 3. c. 9. s. 1. *Vide* ante, 425. *Using violence to*

By stat. 36 Geo. 3. c. 9. entitled, "An act to prevent "obstructions to the free passage of grain within the king- "dom," it is enacted, "that if any person or persons "(after

" (after the 18th of December 1795) shall wilfully and maliciously beat, wound, or use any other violence to or upon any person or persons, with intent to deter or hinder him or them from buying of corn or grain in any market or other place within this kingdom; or shall unlawfully stop or seize any wheat (*a*), flour, meal, malt, or other grain, in or on the way to or from any city, market town, or place in this kingdom; or shall wilfully and maliciously break, cut, or destroy any waggon, cart, or other carriage wherein any such wheat, &c. or other grain shall be loaded, or the harness of any horse or horses drawing or carrying the same; or shall unlawfully take off from any such carriage, or drive away, kill, or wound any such horse or horses; or unlawfully beat or wound the driver or drivers of any such waggon, cart, or other carriage, or horse, so loaded; with intent to stop such wheat, &c. or other grain; or shall by cutting of the sacks, or otherwise, scatter or throw abroad any such wheat, &c.; or shall take or carry away, destroy, spoil, or damage the same, or any part thereof; every and all such person or persons, being thereof lawfully convicted before any two or more justices of the peace of the county, &c. wherein such offence or offences shall be committed, or before the justices of the peace in open Sessions (who are authorised summarily and finally to hear and determine the same), shall be sent to the common gaol or house of correction, there to continue and be kept to hard labour for any time not exceeding three months nor less than one."

Ch. XXII. § 14. *Grain, flour, &c.*

any person to deter him from buying grain; or stopping grain, &c. in its passage;

or breaking or cutting, &c. carriage or harness of horses conveying it;

or taking off from carriage or injuring, &c. horses;

or beating driver;

with intent to stop such grain;

or cutting sacks, or otherwise scattering such grain;

imprisonment on summary conviction before justices of peace.

By s. 2. " If any such person or persons so convicted shall commit any of the offences aforesaid a second time; or if (after the 18th December 1795) any person or persons, with intent to prevent or hinder any corn, meal, flour, malt, or grain from being lawfully carried or removed from any place whatsoever, shall wilfully and

2d offence felony.

(*a*) The words of the prior statute of the 11 Geo. 2. c. 22. s. 1. are, " or shall stop or seize upon any waggon, cart, or other carriage, or horse, loaded with wheat, &c. in or on the way to or from any city, market town, or seaport of this kingdom, and wilfully and maliciously break, cut, separate, or destroy the same, or any part thereof, or the harness of the horses drawing the same; or shall unlawfully take off, drive away, kill, or wound any of such horses, &c."

" maliciously

Ch. XXII. § 14. *Grain, flour, &c.* "maliciously pull, throw down, or otherwise destroy, any storehouse, or granary, or other place in which corn (*a*), meal, flour, malt, or grain shall be then kept, or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away, any corn, flour, meal, malt, or grain therefrom; or shall throw abroad or spoil the same, or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and wilfully and maliciously take and carry away, cast or throw out therefrom, or otherwise spoil or damage any corn, flour, meal, malt, or grain therein (*b*); every person so offending and being thereof lawfully convicted shall be adjudged guilty of felony, and transported for 7 years, in like manner as other felons are directed to be, &c. And if any such offender so transported shall return into this kingdom before the expiration of the said 7 years, he or she shall suffer death as a felon without benefit of clergy." Saving corruption of blood and loss of dower.

Destroying granary, &c. or taking grain, &c. therefrom; or spoiling the same, felony.

Vide ante, 426. The stat. 11 Geo. 2. c. 22. still in force, which was levelled against offences of this description committed, as the title of the act states, "with intent to hinder the exportation of corn," has the same provisions, with the variations noticed below in the margin; and with this further addition, that for the offences created by the first clause of that statute the justices are also directed to adjudge the offender to be publicly whipped at the time and place before specified.

By both acts a conditional remedy is given against the hundred.

§ 15.

X. *Against Cattle.*

Cattle.

37 Hen. 8. c. 6. s. 4. So far back as the reign of Henry VIII. a statute passed, whereby it was enacted, "that if any person or persons "maliciously, unlawfully, and willingly cut out, or cause to "be cut out, the tongue of any tame beast of any other person or persons, the said beast then being in life; every such "offender should not only forfeit to the party grieved treble

(*a*) The words of the stat. 11 Geo. 2. here are, "where corn shall be "then kept *in order to be exported*, or shall unlawfully enter," &c.
(*b*) The same here adds, "intended for exportation."

"damages

" damages for such offence, to be recovered by action of " trespass, but should also forfeit to the King for every such " offence 10*l.* in name of fine." The preamble seems to point, as I have remarked in another place, at such acts done out of malice to the owner.

Ch. XXII. § 15. *Cattle.*

Ante, 1063.

Then the stat. 22 & 23 Car. 2. c. 7. reciting that " whereas divers evil-disposed persons, *intending the ruin* " *and impoverishment of their fellow subjects*, have devised " and of late secretly in the night-time, and at other times " when they think their deeds are not known, frequently " practised in several parts of this kingdom unlawful and " wicked courses in burning of ricks, &c. and cutting, " maiming, wounding, and killing of horses, sheep, beasts, " and *other cattle*, &c.; *for prevention thereof* enacts, (s. 2.) " that if any person or persons shall *in the night-time* mali- " ciously, unlawfully, and willingly, kill or destroy any " horses, sheep, or *other cattle*, of any person or persons " whatsoever; every such offence shall be adjudged felo- " ny, and the offenders and every of them shall suffer as " in case of felony. And (by s. 4.) it is further enacted " and declared, that in case any person or persons who " shall be convict or attainted of any the offences, &c. " aforesaid, (to avoid judgment of death or execution " thereupon for such his offence,) shall make his election " to be transported beyond seas to any of his Majesty's " plantations, that then the justices of assize, oyer and " terminer, gaol delivery, or justices of the peace, before " whom such offender shall be convict or attaint by virtue " of this act, and every of them respectively, shall cause " judgment to be entered against every such offender, that " he be transported beyond the seas to some of his Ma- " jesty's plantations, in the said judgment to be particularly " mentioned and expressed, there to remain for 7 years." " And if any such offender shall return into this kingdom " before the expiration of the said 7 years, he shall suffer " death as a felon, and as if no such election to be trans- " ported had been made by him."

22 & 23 Car. 2. c. 7.

Killing horses, sheep, or other cattle in the night, felony and death, transmutable for transportation.

But by s. 5. " If any person or persons shall in the night- " time maliciously, unlawfully, and willingly maim, wound, " or otherwise hurt any horses, sheep, or other cattle, " *whereby the same shall not be killed or utterly destroyed;* then

" every

Ch. XXII. § 15. *Cattle.*

" every such offender shall forfeit to the party grieved treble " the damage which he shall thereby sustain, to be recovered by action of trespass or upon the case.

Offences within this act must by s. 7. " be proceeded " against within 6 months after the offence committed."

9 Geo. 1. c. 22. s. 1.; made perpetual by 31 Geo. 2. c. 42. s. 2. *Maliciously killing, wounding, or maiming any cattle, a capital felony.*

Lastly, by the Black Act " If any person or persons (whether armed or disguised or not) after the 1st of *June* " 1723, shall unlawfully and maliciously kill, maim, *or* " wound *any cattle;* or shall forcibly rescue any person, " being lawfully in custody of any officer or other person " for any the offences before mentioned; or if any person " or persons shall by gift or promise of money or other " reward procure any of his Majesty's subjects to join him " or them in any such unlawful act; every person so offending, being lawfully convicted thereof, shall be adjudged guilty of felony without benefit of clergy."

Vide tit. *Process against the party.*

Offenders not surrendering themselves pursuant to an order of the King in council are also ousted of clergy by s. 4. as well as those who, " after the time appointed as " aforesaid for the surrender of any person so charged upon " oath with any the offences aforesaid be expired, conceal, " aid, abet, or succour such person, knowing him to have " been so charged as aforesaid, and to have been required " to surrender himself by such order or orders as aforesaid, " being lawfully convicted thereof," &c.

Trial. Ante, 1057.

The trial may, by s. 14., be in any county in *England.*

Aiders and abettors. Midwinter and Sym's case, Gloucester Sp. Assizes 1779,

Aiders and abettors at the fact, who are principals at common law, are holden to be ousted of clergy under the stat. 9 Geo. 1.

Fost. 415. and post. s. 19.

§ 16. *Malice against the owner.*

It is clearly settled, that in order to bring an offender within this law the malice must be directed against the owner of the cattle, and not merely against the animal itself.

Pearce's case, Gloucester Sum. Ass. 1789, cor. Heath J. 2 Leach, 594. *Malice against the animal not within the Black Act.*

Charles Pearce was indicted on the stat. 9 Geo. 1. for " feloniously, unlawfully, wilfully, and malicious maiming " and wounding a cow" of the prosecutor's. It appeared that his intent was to commit bestiality with the animal, and that he had in a passion run a sharp pointed stick quite through her body because she would not stand quiet. Heath J. directed the prisoner to be acquitted on this charge; it being

being necessary to shew that the fact was committed from some *malicious motive towards the owner*, and not merely from an angry and passionate disposition towards the beast itself, *without any intention of thereby injuring the owner.* Ch. XXII. § 16. *Cattle.*

The same point was ruled in the case of one John Kean, by the same learned Judge, where the fact of killing appeared to have been done in a moment of passion against the animal. Kean's case, O. B. 1789, 2 Leach, 595. 609.

And again in John Shepherd's case, upon a similar indictment tried at the O. B. before Hotham B. and Heath J. the evidence was, that the prisoner, who was servant to the prosecutor, had solicited him earnestly to let him have another of the horses called Boxer, instead of the one which was afterwards maimed, and which at the time the mischief was done was employed under the direction of the prisoner, in carrying dung in the team. His request was not complied with; and he was afterwards seen holding the horse by the tongue with one hand while he beat him violently over the head with the butt end of a whip which he held in the other: and afterwards the animal was found lying in a meadow with its tongue hanging quite out of its mouth, and one part of it, which was quite dead, was nearly severed from the other. But there was no other evidence that the prisoner had any malice against his master, except only, that on being remonstrated with on the barbarity of his conduct, he had declared in the heat of his passion, that he would do the other horse an injury if his master did not let him have Boxer to go in the team; neither did the immediate cause of his resentment against the animal appear. It was left to the jury to consider whether the prisoner's conduct had been actuated by any motives of personal revenge against his master, or had proceeded from some sudden passion against the animal itself; for unless they were of opinion that it was done from a malicious motive against the owner, however brutal his conduct was, he did not come within the meaning of the act. The prisoner was thereupon acquitted. Shepherd's case, O. B. Oct. 1790, 2 Leach, 609. *Proof of dislike by a servant to a particular horse, and the fact committed after the master's refusal to let him have another, not sufficient to bring the case within the Black Act; though the prisoner had before threatened the injury if his master would not let him have the other horse.*

There was another case some years ago, the name of which I have not been able to learn, said to have been decided by Mr. Justice Heath, where it appeared that the prisoner had cut the tendons of the hinder legs of several *Maiming sheep because they overleapt their bounds, not within the act.* Ex relatione.

Ch. XXII. § 16. *Cattle.*

sheep that had from time to time broke over into his inclosure; which was holden not to be a case within the statute.

In all these cases there was reasonable evidence appearing upon the face of the transaction itself to impute the motive of the fact to resentment against the particular animals, and not to any personal malice against the owner. But it does not appear to have been decided that it is necessary to give express evidence of previous malice against the owner, in order to bring a case within the act: but the fact being proved to be done wilfully, which can only proceed from a brutal or malignant mind, it seems a question solely for the consideration of the jury to attribute the real motive to it: to which the transaction itself will most probably furnish a clue. And in Daniel Ranger's case, although that point was not directly in judgment, the Judges agreed in the debate that it was not necessary in these cases for the prosecutor to prove a previous existing malice against the owner.

Ranger's case, Surry Sum. Ass. 1798, cor. Buller J. MS. Buller J. and MS. Jud.

§ 17. *No indictment lies at common law for unlawfully with force and arms maiming a horse.*

The last-mentioned case was an indictment at common law, which charged that the prisoner "on 23d of May, 33 Geo. 3. with force and arms, at, &c. one black gelding of the value of 30*l.* of the goods and chattels of William Collyer, then and there being, then and there unlawfully did maim, to the great damage of Collyer, and against the peace," &c. But upon reference to the Judges after conviction, they all held that the indictment contained no indictable offence; for if the case were not within the Black Act, the fact in itself was only a trespass: for that the words *vi et armis* did not imply force sufficient to support an indictment.

§ 18. *Cattle.*

As to what shall be deemed *cattle* within the Black Act: John Paty was tried and convicted on an indictment framed on the stat. 9 Geo. 1. c. 22. for feloniously, unlawfully, knowingly, wilfully, and maliciously shooting and killing one mare, of a mixed red and white colour, and one brown stone colt, the goods and chattels of Matthew Batten. The words of the statute are, "That if any person shall "unlawfully and maliciously kill, &c. any *cattle*, he shall "suffer death without benefit of clergy." It was moved in arrest

Paty's case, Abingdon Sum. Ass. 1770, cor. Blackstone J. 2 Blac. Rep. 721. *The 9 Geo. 1. c. 22. was designed to extend and not abridge the offences described in 22 & 23 Car 2. c. 7.*

arrest of judgment, 1st, That the mare and colt were not averred in the indictment to be *cattle* within the meaning of the act. 2dly, That the word *cattle* does not necessarily include *horses*, *mares*, *and colts*. To support these objections it was argued, that the Legislature in the statutes of 3 & 4 Ed. 6. c. 19. 5 & 6 Ed. 6. c. 14. and 31 Geo. 2. c. 40. for regulating the sale of *cattle*, has thought it necessary to mention by name the several species of beasts to which the provisions of those acts were designed to extend. That the book of rates (12 Car. 2. c. 4.) distinguishes between the subsidy to be paid on *great cattle* imported, viz. 50 shillings, and that on *horses and mares*, viz. 10*l*. That the stat. 22 Car. 2. c. 13. distinguishes between the encouragements given for breeding *cattle of all sorts*, and for breeding *horses;* and that when the stat. 14 Geo. 2. c. 6. made it felony without clergy to steal sheep or other cattle, it was found necessary to specify by stat. 15 Geo. 2. c. 34. what cattle were intended by the act, among which neither *horses*, *mares*, *or colts* are included (*a*). On the first day of Michaelmas term 1770 this case was submitted to the Judges at Serjeants'-Inn; and they unanimously agreed, That as the stat. of 22 & 23 Car. 2. c. 7. had made the offence of killing horses by night a single felony, this stat. of 9 Geo. 1. c. 22. was only to be considered as an extension of that act; and some precedents of capital convictions were cited upon this branch of the statute, though none of executions. It was therefore agreed that judgment of death should be given against the prisoner at the next assizes; but he was then reprieved for transportation; and afterwards, (upon strong application from the country,) received a free pardon.

Ch. XXII. § 18. *Cattle.*

and therefore horses, mares, and colts are included in the word cattle.

Vide ante, 616.

In Robert Mott's case, who was convicted for wounding a gelding, a similar objection in arrest of judgment was overruled by Mr. Baron Hotham upon the authority of the above case.

Mott's case, O. B. Sept. 1783, 1 Leach, 85. n.

(*a*) The argument derived in the above case from the stats. 14 & 15 Geo. 2. on behalf of the prisoner will be found to lose much of its force by adverting to the preamble of the first of those statutes: from whence it appears that one principal object of the law was to guard against an artful practice of sheep stealers, and stealers of other cattle for food, whose principal object being the carcass, they stripped the animal which they killed on the spot, and left their skins there for fear of detection. This of course is quite foreign to the intention and purpose of horse-stealers.

The

Ch. XXII. § 18. *Cattle.*

The same point was ruled in Moyle's case, who was convicted of killing a mare.

Moyle's case, Bodmin Sum. Ass. 1791, cor. Buller J.

It is plain that the Legislature must have intended to include *horses* in the word "*cattle*," when in the stat. of Car. 2. they speak of "horses, sheep, or *other cattle*:" and by the statute of George the first they exclude from clergy such as kill, &c. *any cattle:* which latter statute was evidently intended to enlarge and not to restrain the description of the felony: for it extends to such as "maim or wound" any cattle, though not destroyed, which by the prior act was left a misdemeanor at most, punishable only by action to recover treble damages.

§ 19. *Aiders and abettors.*

Midwinter and Sims' case, Gloucester Sp. Ass. 1779, Fost 415. Appx. last edition.

Aiders and abettors at the fact of killing a mare of another from malice to the owner are ousted of clergy by the st. 9 G. 1. c. 22. *as well as the principal, who gave the mortal blow.*

In the case of Midwinter and Sims, who were indicted and convicted on the Black Act for killing a mare of Mr. Dutton's, the verdict was approved by all the Judges as to the principal offender; though Mr. Justice Foster dissented from the rest as to the propriety of ousting Sims of his clergy, who was no more than an aider and abettor at the fact. The circumstances there were, that the prisoners, having conceived a prejudice against the prosecutor on account of a prosecution which he was then carrying on against them for stealing rabbits, agreed to take their revenge on him, and to kill one of his breeding mares that night; which they executed accordingly: Midwinter with the assistance of the other having caught the mare, buckled his own girdle about her neck, and fastened a girdle of Sims' to his own: and Sims, having taken hold of the girdle fixed in this manner to the mare's neck, held it fast in order to prevent the mare getting away, while Midwinter with a large sharp hook gave the mare a deep wound in the belly, of which she died the same night.

§ 20.

Haywood's case, Coventry Sum. Ass. 1801, cor. Rooke J. MS. Jud.

Wounding a horse out of malice to the owner by driving a nail into the frog of his hoof, is within the Black Act, 9 Geo. 1. c. 22. *though the injury were only temporary.*

As to the extent of the injury received by the animal; if the maim or wound were not mortal, the case did not amount to felony within the stat. of Car. 2.; but that is otherwise within the act of Geo. 1.

John Haywood was tried on an indictment on the Black Act, containing two counts, one for maliciously maiming, the other for maliciously wounding a gelding, against the statute. It was proved, that on the 10th of June the prisoner

soner had maliciously and with an intent to injure the prosecutor driven a nail into the frog of the horse's foot; and the horse was thereby rendered useless to the owner, and continued so at the time of the trial (1st August): but the prosecutor said he was likely to do well, and to be perfectly sound again in a short time. After conviction, judgment was respited upon a doubt, whether as the horse was likely to recover, and as the wound was not a permanent injury, the offence were within the statute? In Michaelmas term 1801 all the Judges held the conviction right. The words of the stat. 9 Geo. 1. c. 22. are, "shall unlawfully and "maliciously kill, maim, or *wound* any cattle," &c.; which word *wound* appears to be used as contradistinguished from a permanent injury, such as maiming.

Ch. XXII. § 20. *Cattle.*

11. *Manufactures.* § 21.

The provisions made by statute for the protection of manufactures from depredation, as well as the persons of master manufacturers from unlawful violence, having been before mentioned, I now proceed to consider another sort of protection by which this species of property is guarded.

Ante, tit. *Larceny*, p. 618, &c. and tit. *Assaults*, &c. 426.

By the stat. 22 Geo. 3. c. 40. s. 2. "If any person or "persons shall by day or by night break into any house or "shop, or enter by force into any house or shop, with intent to cut or destroy any serge, or other woollen goods "in the loom, or any tools employed in the making thereof; or shall wilfully and maliciously cut or destroy any such "serges or woollen goods in the loom, or on the rack, or shall "burn, cut, or destroy any rack on which any such serges or "other woollen goods are hanged in order to dry; or shall "wilfully and maliciously break or destroy any tools used in "the making any such serges or other woollen goods, not "having the consent of the owner so to do; every such offender being thereof lawfully convicted shall be guilty of "felony without benefit of clergy."

Woollens. 22 Geo. 3. c. 40. s. 2. this repeals a similar provision in stat. 12 Geo. 1. c. 34. s. 7.

Breaking into house, &c. with intent to cut or destroy woollens in the loom, or rack, or tools, or cutting, &c. such, a capital felony.

The same statute, s. 2. enacts, "that if any person or "persons shall by day or by night break into any house or "shop, or enter by force into any house or shop, with intent "to cut or destroy any velvet, wrought silk, or silk mixed "with

§ 22. *Silk.*

Ch. XXII. § 22. *Manufactures.* " with any other materials, or other silk manufacture in the " loom, or any warp or shute, tools, tackle, or utensils; or " shall wilfully and maliciously cut or destroy any velvet, " wrought silk, or silk mixed with any other materials, or " other silk manufacture in the loom, or any warp or shute, " tools, &c. prepared or employed in or for the making " thereof; or shall wilfully and maliciously break or destroy " any tools, tackle, or utensils used in or for the weaving or " making of any such velvet, &c. or other silk goods or silk " manufacture; not having the consent of the owner so to " do; every such offender, being thereof lawfully convicted, " shall be guilty of felony, without benefit of clergy."

§ 23. *Linen or cotton.* Also by s. 3. it is enacted, " that if any person or persons " shall by day or by night break into any house or shop, or " enter by force into any house or shop with intent to cut " and (*a*) destroy any linen or cotton, or linen and cotton " mixed with any other materials, or other linen or cotton " manufactures in the loom, or any warp, or shute, tools, " tackle, and utensils; or shall wilfully and maliciously cut or " destroy any linen or cotton, or linen or cotton mixed with " any other materials, or other linen and cotton manufacture " in the loom, or any warp, or shute, tools, tackle, and " utensils prepared for or employed in the making thereof; " or shall wilfully and maliciously break and destroy any " tools, tackle, or utensils used in or for the carding, spin- " ning, weaving, preparing, or making, in any way what- " ever, any such linen or cotton, or linen or cotton mixed " with any other materials, or other linen and cotton goods, " or linen and cotton manufactures whatsoever; not having " the consent of the owner so to do; every such offender, " being thereof lawfully convicted, shall be guilty of felony " without benefit of clergy."

(*a*) The word *or* is used in the prior section, and post.

Vide the title of the act. This act repeals so much of the stat. 12 Geo. 1. c. 34. and of the stat. 6 Geo. 3. c. 28. " as relates to the punish- " ment of persons destroying any woollen or silk manufac- " tures, or any implements prepared for or used therein;" and the clauses of the former act so repealed which are recited in this statute are verbatim the same. But it does not profess to repeal the following statute, which contains provisions varying in several respects from the clause last set forth. And Lord Hale informs us, that a second statute

1 Hale, 705.

enact-

enacting the same offence to be felony that was so enacted before, with some alterations, is but cumulative, and no repeal of the former act: which must doubtless be understood with this reserve, that the two provisions may well stand together without clashing or inconsistency.

By stat. 4 Geo. 3. c. 37. s. 16. "If any person or persons "shall by day or night break into any house, shop, cellar, "vault, or other place or building, or by force enter into "any house, &c. or other place or building, with intent "to steal, cut, or destroy, any linen yarn, or any linen "cloth, or any manufacture of linen yarn, belonging to "any manufactory, or the looms, tools, or implements "used therein; or shall wilfully or maliciously cut in pieces, "or destroy, any such goods, either when exposed to bleach "or dry; every such offender, being thereof lawfully con- "victed, shall be judged guilty of felony, without benefit "of clergy." This by s. 33. is made a public act.

4 Geo. 3. c. 37. as to stealing such, *vide* ante, 620.

§ 24. *Plate glass.*

By stat. 38 Geo. 3. c. 17. s. 24. for 21 years from the 7th of May 1798, and to the end of the then next session, "If any person or persons shall by day or night break into "any house, shop, cellar, vault, or other place or build- "ing, or by force enter into any house, &c. or other place "or building, belonging to the said manufactory (i. e. of "the governor and company of the British cast-plate-glass "manufactory), or wherein the same shall be then carry- "ing on, with intent to steal, cut (*a*), break, or otherwise "destroy any glass, wrought or unwrought, or any mate- "rials, tools, or implements, used in, for, or about the mak- "ing thereof, or any goods or wares belonging to the said "manufactory; or shall steal, or wilfully or maliciously cut, "break, or otherwise destroy any such glass, materials, "tools, or implements; every such offender, being lawfully "convicted, shall be judged guilty of felony, and trans- "ported for seven years (*b*), or shall be adjudged to suffer "such less punishment as the Court before whom such of- "fender or offenders shall be tried shall think fit to "award.

38 Geo. 3. c. 17. (This, though a public act, is to be found among the private and local acts.)

(*b*) The following words were not in the first statute.

(*a*) The printed stat. has here the word *out*, instead of *cut*, probably a misprint, as the word *cut* afterwards is used; and the stat. 13 Geo. 3. c. 38. s. 29. for incorporating the original company, from whence this was probably taken, has the word *cut*.

2. *High-*

12. *Highways.*

§ 25.
Vide general title *Highways and Bridges.*

All nuisances to such are indictable at common law: and by the general highway act, 13 Geo. 3. c. 78. s. 42., the damaging of posts, blocks, and great stones set up to secure causeways, and of the banks which secure and defend the same, and the stones, bricks, or wood, fixed on the parapets or battlements of bridges, as also the pulling down, destroying or defacing of mile stones or direction posts, is made liable on conviction before a justice of the peace to a penalty not exceeding 5*l.*, nor less than 10*s.*; and in default of payment the offender is to be committed to the house of correction, there to be whipped and kept to hard labour not exceeding one calendar month, nor less than seven days.

13. *Turnpikes.*

§ 26.
Vide post. s. 32.

The stat. 7 Geo. 3. c. 40. repealed all former general provisions relative to turnpikes: this again was repealed (except as to so much as repealed the former acts) by the stat. 13 Geo. 3. c. 84. s. 86. which latter consolidates all the former provisions intended to be retained. And

13 Geo. 3. c. 84.
Destroying turnpike gates, posts, rails, &c. or engines for weighing, &c.

By s. 42. of that act, "To prevent the malicious destroying of any turnpike gate or house which hath been or shall hereafter be erected," it is enacted, "that if any person or persons whatsoever shall either by day or night wilfully or maliciously pull down, pluck up, throw down, level, or otherwise destroy any turnpike gate, or turnpike gates, or any post or posts, rail or rails, wall or walls, or any chain, bar, or other fence or fences belonging to any turnpike gate, or any other chain, bar, or fence of any kind whatsoever, set up or erected, or hereafter to be set up or erected, to prevent passengers from passing by without paying any toll, laid or directed to be paid by any act or acts of parliament made for that purpose; or any house or houses erected or to be erected for the use of any such turnpike gate or turnpike gates; or any crane, machine, or engine, made or erected, or to be made or erected on any turnpike road by authority of parliament, for weighing waggons, carts, or carriages; or shall forcibly rescue any person or persons, being lawfully in custody

" tody of any officer or other person for any of the offences " before-mentioned; every person so offending in any of " the said cases, being thereof lawfully convicted, shall be " adjudged guilty of felony, and shall be transported to one " of his Majesty's plantations abroad for seven years, or " shall be committed to prison for any time not exceeding " three years, at the discretion of the Judge or Court before " whom such offender shall be tried. And any indictment " for such offences may be inquired of, tried and determined " in any adjacent county within that part of *Great Britain* " called *England*, in such manner and form as if the facts " had been there committed."

Ch. XXII. § 26. *Turnpikes.*

Felony and transportation or imprisonment for three years. The st. 8 G. 2. c. 20. had made the offence a capital felony.

Trial.

By s. 43. the hundred shall make satisfaction, &c.

14. *Bridges.*

§ 27. *Bridges.*

The malicious destruction or damaging of public bridges is no doubt punishable as a misdemeanor at common law, being a nuisance to all the King's subjects; and the general highway act of the 13 Geo. 3. c. 78. subjects to a penalty of 5*l.* on summary conviction before a justice of peace, and in default of payment to whipping, imprisonment, and hard labour, every person who shall " break, damage, or throw " down the stones, bricks, or wood fixed upon the parapets " or battlements of bridges."

In many instances the Legislature have made the offence of destroying or damaging particular bridges felony; and in some have ousted such offenders from the benefit of clergy. It would be endless to set out these acts: such as have fallen under my notice are subjoined in a note (*a*).

15. *Mines and Engines.*

§ 28. *Setting fire to coal mines.* 10 Geo. c. 32 s. 6.

By stat. 10 Geo. 2. c. 32. s. 6. " After the 23d of June " 1737 and during the continuance of the stat. 9 Geo. 1.

(*a*) London B. 31 Geo. 2. c. 20. s. 6. Westminster B. 9 G. 2. c. 29. Blackfriars B. 29 Geo. 2. c. 86. Fulham B. 12 Geo. 1. c. 36. s. 3. Old Brentford B. 30 Geo. 2. c. 63. s. 19. and 31 Geo. 2. c. 48. Hampton Court B. 23 Geo. 2. c. 37. s. 12. Walton B. 20 Geo. 2. c. 22. s. 3. Ribble B. 24 Geo. 2. c. 36. Sandwich B. 28 Geo. 2. c. 55. Wye B. 29 Geo. 2. c. 73. s. 5. Urse B. 29 Geo. 2. c. 73. J. Ferry's B. 30 Geo. 2. c. 59. and 18 Geo. 3. c. 10. Trent B. 31 Geo. 2. c. 59.

Ch. XXII. § 28. *Mines and engines.*

" c. 22." (this is the Black Act, which after several continuances was together with this act made perpetual by the stat. 31 Geo. 2. c. 42.) " if any person or persons shall wil-
" fully and maliciously set on fire or cause to be set on fire
" any mine, pit, or delph of coal or cannel coal; every per-
" son so offending, being thereof lawfully convicted, shall be
" adjudged guilty of felony, without benefit of clergy."

And by s. 4. of the same act, " all the provisions made in
" the stat. 9 Geo. 1. c. 22. for the more speedy and easy
" bringing the offenders against the said act to justice, and
" the persons who shall conceal, aid, abet, or succour such
" offenders, and for making satisfaction and amends to all
" and every the person and persons, their executors and ad-
" ministrators, for the damages they shall have sustained or
" suffered by any offender or offenders against the said act,
" and for the encouragement of persons to apprehend and
" secure such offender and offenders, and for the better and
" more impartial trial of any indictment or information
" which shall be found, commenced or prosecuted for any of
" the offences committed against the said act, together with
" all restrictions, limitations, and mitigations by the said act
" directed, shall during the continuance of the said act ex-
" tend to and be of force and effect in all cases of offences
" committed by wilfully and maliciously setting on fire, or
" causing to be set on fire, any mine, pit, or delph of coal or
" cannel coal."

13 Geo. 2. c. 21. *Drowning collieries subjects party to treble damages in action.*

Then the stat. 13 Geo. 2. c. 21. entitled an act " for
" *further* and more effectually preventing the wilful and
" malicious destruction of collieries and coal-works;" reciting that " divers evil-disposed persons possessed of or in-
" terested in collieries, have by secret and subtil devices
" wilfully and maliciously attempted to drown adjacent
" collieries, and have by means of water conveyed or ob-
" structed for that purpose destroyed or damaged the same,
" *intending* thereby to enhance the price of coals and gain
" the monopoly thereof." And then reciting the act of the 10 Geo. 2. c. 32. whereby the wilfully and maliciously setting on *fire* any such mine, &c. is made a capital felony; " and
" whereas it is reasonable that an adequate punishment
" should likewise be inflicted on persons who shall wilfully
" and maliciously destroy or damage collieries by means of
" *water*,

" *water*, as is aforesaid;" it therefore enacts, " that if any " person after the 12th of *June* 1740 shall unlawfully, wil- " fully and *maliciously* divert or cause to be diverted water " from any river, brook, water course, channel or land " flood, or convey or cause to be conveyed water into any " coal-work, mine, pit, or delph of coal, or into any sub- " terraneous cavities or passages, or make or cause to be " made any subterraneous cavities or passages, with design " thereby to destroy or damage any coal work, &c. belong- " ing to any other person or persons, or shall for that pur- " pose unlawfully and maliciously destroy or obstruct any " sough or sewer (which has been a sough or sewer in com- " mon for 50 years), made for draining any coal work, &c.: " or shall attempt or continue any such mischievous prac- " tice; or shall aid or assist therein in manner aforesaid; " every such person shall for every such offence forfeit and " pay to the party aggrieved treble damages and full costs " of suit, to be recovered by action of debt, bill, plaint, or " information, in any of the King's Courts of Record at " *Westminster*:" provided (by s. 2.) that the owner of any sough, &c. may destroy, &c. or use it as he might before lawfully do.

There seems to be an incongruous and unprecedented disparity in the punishments inflicted by the two last mentioned acts, assuming the fact of destroying the mine in the one case *by fire*, and in the other *by water*, to be done *wilfully and maliciously;* unless it can be supposed that the legislature meant to distinguish between an act done from mere malice to the owner, and one done lucri causâ, as the latter statute plainly imports in the preamble. Yet the distinction (supposing some to exist,) has seldom if ever been carried so far in legislation as in this instance. In small offences it is frequent enough, and not unreasonable, that those who cannot pay in their purses should pay in their persons the penalty of their misdeeds; but this is confined to temporary and moderate suffering, and does not touch life itself. This affords a presumption that the true ground of the distinction made by the two acts was in the mean used being in its nature more destructive, and the damage more extensive and irreparable in the one case of firing than in the other of drowning a mine. For otherwise it might be argued

Ch. XXII. § 28. *Mines and engines.*

gued that if the act of firing were proved to have been done by the owner of an adjoining mine merely for the sake of increasing his own profit, and not from malice to the person of the owner, the case would not fall within the spirit of the first law; though certainly there is nothing in the words to warrant any such distinction: and as the statute in question refers to the Black Act, with which it was meant to be incorporated, it seems as if the case of burning a coal mine was in point of intent to be governed by the same consideration as the case of arson and other burning provided for by that law.

9 Geo. 1. c. 22.

§ 29.

Destroying engines for draining mines, felony and transportation:

or bridge-ways or waggon-ways, &c.

For the further protection of this and other mining property, the stat. 9 Geo. 3. c. 29. s. 3. enacts, "that if any person or persons shall at any time after the first of *July* 1769 wilfully or maliciously set fire to, burn, demolish, pull down, or otherwise destroy, or damage any fire engine or other engine, erected or to be erected for draining water from collieries or coal mines, or for drawing coals out of the same; or for draining water from any mine of lead, tin, copper, or other mineral; or any bridge, waggon-way, or trunk, erected or to be erected for conveying coals from any colliery or coal mine, or staith for depositing the same; or any bridge or waggon-way erected or to be erected for conveying lead, tin, copper, or other mineral, from any such mine; every such person being lawfully convicted of any of the said offences, or of causing or procuring the same to be done, shall be adjudged guilty of felony, and shall be liable to the same pains and penalties as in cases of felony; and the court before whom such person shall be tried shall have authority to transport such felon for the term of seven years, in like manner as other felons are directed to be," &c.

9 Geo. 3. c. 29.

Prosecution within 18 months.

S. 4. provides that no person shall be prosecuted for any offence by virtue of this act, "unless such prosecution be commenced within 18 months after the offence committed."

§ 30.

Pulling down, filling up, &c.

Again by stat. 39 & 40 Geo. 3. c. 77. s. 1. entitled "An act for the security of collieries and mines, and for the better regulation of colliers and miners;" reciting that "from

39 & 40 Geo. 3. c. 77.

" from the situation of the veins and mines of coal and iron Ch. XXII. § 30.
" stone, they are greatly exposed to the depredations of evil *Mines and engines.*
" disposed persons, and the laws in being are inadequate to
" the protection thereof, enacts, that if any person or per- *air-way or water-way, &c. of*
" sons shall, after the 1st of *September* 1800, wilfully and *any mine, subject*
" maliciously pull down, fill up, or begin or attempt to pull *to imprisonment:*
" down or fill up, any air-way, water-way, drain, pit,
" level, or shaft, or damage or destroy any rail-way, tram- *so damaging railway, &c.*
" road, or other road leading to or from, or intended to lead
" to or from any coal or other mine work; or if any per-
" son or persons (not having or bonâ fide claiming a right
" to possess or work the same respectively), shall, after the
" said time wilfully and unlawfully cut, dig, raise, take, or *Vide* ante, 595.
" carry away any coal, culm, or other mineral, from any
" bed, band, vein, or mine, lying and being in any waste,
" open or uninclosed lands; or shall wilfully and unlaw-
" fully enter into any level, pit, or shaft, with an intent to
" dig, cut, raise, take, or carry away therefrom any coal,
" culm, or other mineral; or shall aid, abet, assist, hire, or *Accessaries before and aiders, &c.*
" command any person or persons to commit any such of-
" fence or offences as aforesaid, then and in every such case
" all and every such person or persons shall be deemed and
" adjudged guilty of a misdemeanor, and the court before
" whom any such person or persons shall be tried and con-
" victed shall have authority to cause such person or per-
" sons to be imprisoned for any term not exceeding six
" months."

" Provided by s. 2. this shall not extend to any trespass or *Exception in favour of owners, &c. of adjoining mines.*
" damage done or committed under ground by any owner
" or owners of any adjoining coal, or other mine, in work-
" ing the same, or by any person or persons duly authorised
" and employed in such working as aforesaid."

By s. 9. " No person shall be prosecuted for any offence *Limitation of prosecutions.*
" against this act, unless such prosecution be begun within
" nine calendar months after the offence committed."

The offence of breaking into the black lead mines consti- *Black lead mines.*
tuted by the stat. 25 Geo. 2. c. 10. must be with intent to Ante, 594.
steal, and was therefore stated in another place.

16. *Sea*

Ch. XXII. § 31.
Sea and river banks.

16. *Sea Banks and Banks of Rivers.*

§ 31.
6 Geo. 2. c. 37.

By the stat. 6 Geo. 2. c. 37. s. 5. "If any person or persons, after the 24th of *June* 1733, and during the continuance of the stat. 9 Geo. 1. c. 22. shall unlawfully and maliciously break down, or cut down, the bank or banks of any river, or any sea bank, whereby any lands shall be overflowed or damaged; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony without benefit of clergy."

This act and that of the 9 Geo. 1. c. 22. were made perpetual by stat. 31 Geo. 2. c. 42.

10 Geo. 2. c. 32. *Extending provisions of the Black Act to these offences.*

The stat. 10 Geo. 2. c. 32. s. 4. further enacts, "That all the provisions made in the act of the 9 Geo. 1. c. 22. for the more speedy and easy bringing the offenders against the said act to justice, and the persons who shall conceal, aid, abet, or succour such offenders, and for making satisfaction and amends to all and every the person and persons, their executors and administrators, for the damages they shall have sustained or suffered by any offender or offenders against the said act, and for the encouragement of persons to apprehend and secure such offender and offenders, and for the better and more impartial trial of any indictment or information which shall be found, commenced, or prosecuted for any of the offences committed against the said act, together with all restrictions, limitations, and mitigations by the said act directed, shall, during the continuance of the said act, extend to and be of force and effect in all cases of offences committed by unlawfully and maliciously breaking down or cutting down the bank or banks of any river, or any sea bank, whereby any lands shall be overflowed or damaged."

This clause was also made perpetual by the stat. 31 Geo. 2. c. 42. s. 5.

s. 5. *Unlawfully destroying or taking away piles, chalk, or other materials from sea banks or walls 20l. penalty on summary conviction.*

By s. 5. of the stat. 10 Geo. 2. c. 32. reciting "That it frequently happens that idle and disorderly people employed in fishing boats, and others residing near the sea coasts, do unlawfully and maliciously cut off, &c. and destroy the piles which are drove into the marsh or sea walls

" walls and banks, whereby the chalk and other materials Ch. XXII. § 31.
" used for securing the said walls and banks fall away, and *Sea and river banks.*
" oftentimes take the said chalk and other materials used
" for that purpose, and thereby frequent inundations hap-
" pen to the lands lying within the said walls and banks, to
" the great damage of the owners and occupiers of the said
" lands; for remedy thereof," enacts, " that if any person
" or persons shall at any time or times hereafter unlawfully
" cut off, draw up, or remove and carry away any piles,
" chalk, or other materials, which are, or at any time
" hereafter shall be driven into the ground, and used for
" the securing any marsh or sea walls or banks, in order to
" prevent the lands lying within the same from being over-
" flowed and damaged," it shall be lawful for one or more justice of the peace residing near the place to hear the complaint in the manner there stated; and the offender upon conviction shall forfeit 20*l.* &c. or in default of payment be committed to the house of correction, there to be kept at hard labour for six months.

The duration of this provision was not limited to any particular time.

By the stat. 19 Geo. 2. c. 22. a summary jurisdiction is given to one or more justices of peace to inquire of and determine certain offences against the due preservation of havens, roads, channels, and navigable rivers in England, by unloading rubbish, &c. out of vessels within the same, or suffering old hulks to sink there, or not removing such as are stranded. 19 Geo. 2. c. 22. *Discharging rubbish in harbours, or suffering stranded vessels to remain, &c.*

17. *Locks and other Works on navigable Rivers.*

The first statute passed on this subject was the 1 Geo. 2. st. 2. c. 19. entitled an act for punishing such persons as wilfully and maliciously destroy turnpikes, &c. " or locks " or other works erected by authority of parliament for " making rivers navigable," which reciting that evil disposed persons had destroyed turnpike gates, &c. and had " threat- " ened the pulling down and destroying of locks, sluices, " and flood-gates, erected to preserve and secure the navi- " gation of rivers made navigable pursuant to acts of parlia- " ment for that purpose; for preventing such practices, " and § 32. *Locks, &c. on navigable rivers.* 1 Geo. 2. st. 2. c. 19.

Ch. XXII. § 32. *Locks, sluices, &c.*

" and for rendering the said acts more effectual," enacts, that if any person shall by day or night wilfully and maliciously break down, &c. or otherwise destroy any turnpike gate, &c. he shall be subject to certain corporal punishment upon conviction before two justices of peace, &c. Then by s. 2. " if any such person or persons so convicted shall, after " the said 24th of *June* 1728, commit any of the offences " aforesaid a second time; or if any person or persons shall, " either by day or night, wilfully and maliciously pull down or " demolish any house or houses erected or to be erected for the " service of any turnpike gate, &c. or shall wilfully and ma- " liciously break down or demolish any lock, sluice, or flood- " gate, erected or to be erected by authority of parliament, " *upon any navigable river, for preserving or securing the na-* " *vigation thereof*, and shall be lawfully convicted of the same " respectively upon indictment before any justices of assize, " oyer and terminer or gaol delivery for the county, &c. bo- " rough or corporation where such offence or offences respec- " tively shall be committed; every such person and persons " offending, and being thereof lawfully convicted, shall be " adjudged guilty of felony, and subject to the like pains " and penalties as in cases of felony; and the court before " whom such person or persons shall be tried shall have au- " thority to transport such felons for seven years, in like " manner as other felons," &c.

Maliciously demolishing locks, sluices, &c. on navigable rivers, felony and transportation.

5 Geo. 2. c. 33.

Then the stat. 5 Geo. 2. c. 33. reciting that the act of the 1 Geo. 2., " for punishing such persons as wilfully and ma- " liciously pull down or destroy turnpikes or locks or " other works erected by authority of parliament, for ma- " king rivers navigable, and that the provisions by the said " act made for punishing *such* offenders have been found in- " sufficient; for remedy thereof and for rendering the said " act more effectual," by s. 1. makes the malicious destroying of turnpikes felony, and gives authority to transport every such felon for seven years.

Returning from transportation, death.

Then by s. 2. it is further enacted, that " if *such* offender " or offenders shall return into *Great Britain* or *Ireland* be- " fore the expiration of the said term of seven years, con- " trary to the true intent or meaning hereof, *or of the said* " *act passed in the 1st Geo. 2.* (stat. 2. c. 19.) he or they so " returning shall suffer death as felons, and have execution " awarded

" awarded against them as persons attainted of felony, with- Ch. XXII. § 32.
" out benefit of clergy." *Locks, sluices, &c.*

The words in Italics must refer to such as being convicted of destroying sluices, &c. were sentenced to transportation under the stat. 1 Geo. 2., because none other were transportable under that statute, and therefore none other could return, *contrary to the true intent and meaning of the said act;* although there be some obscurity in the clause by the use of the relative word *such* (such offenders, &c.) in the beginning of it, which must mean *such offenders* as are spoken of in the preamble of the act, and not merely such as are last spoken of in the preceding enacting clause.

The third clause enables the trustees, proprietors, &c. or other persons authorized to put in execution any act or acts of parliament for repairing of highways *or* making rivers navigable out of the tolls, &c. to discharge the expences of any action, &c. indictment or other prosecution which shall be commenced on account of the destroying, &c. any turnpike gate, &c. " or any lock, sluice, flood-gate, or other works on " any navigable river, erected or to be erected by authority " of parliament." *Expences of prosecution.*

Then the stat. 8 Geo. 2. reciting the act of the first and fifth of Geo. 2. and " that the provisions for punishing *such* " offenders had been found insufficient, for rendering the *said* " acts more effectual," enacts, " that if any person or per- " sons whatsoever, after the 15th of May 1735, shall either " by day or night wilfully *or* maliciously pull down, pluck " up, throw down, level, or otherwise destroy any turnpike " gate (*a*), &c. or any lock, sluice, flood-gate, or other works, " on any navigable river erected or to be erected by autho- " rity of parliament; or forcibly rescue any person or per- " sons, being lawfully in custody of any officer or other per- " son for any of the offences before mentioned; that then " and in any of the said cases every person so offending, " being thereof lawfully convicted, shall suffer death, as in " cases of felony, without benefit of clergy." 8 Geo. 2. c. 20. *Clergy.* (*a*) So much of the act as respects turnpikes was afterwards repealed, *vide* ante, 1080. *Rescuing offenders.*

By s. 2. persons wilfully and maliciously drawing up any flood-gate, fixed or made in any wear or lock made or to be made, &c. upon any navigable river, for preserving the navigation thereof, are subject to imprisonment and hard la-

Ch. XXII. § 32. *Locks, sluices, &c.*

bour for a month, upon a summary conviction before two justices of the peace.

Trial.

By s. 3. "Every offence aforesaid done contrary to this "act shall and may be inquired of, examined, tried, and "determined in any adjacent county within that part of "*Great Britain* called *England*, in such manner and form "as if the fact had been therein committed."

Pardon.

By s. 5. Offenders out of prison discovering and convicting others guilty of the said felonies shall be pardoned.

By s. 6. &c. a conditional remedy is given to recover damages against the hundred.

These several acts having been suffered to expire, were all revived from the 1st of June 1742, for a certain period, by the stat. 15 Geo. 2. c. 33. s. 1. and continued by the stat. 20 Geo. 2. c. 47., and finally made perpetual by the stat. 27 Geo. 2. c. 16. A few years afterwards we find the following law.

4 Geo. 3. c. 12. s. 5. *Transportation.*

The stat. 4 Geo. 3. c. 12. s. 5. reciting that "the laws "then in being were not sufficient for the preservation of "the banks, flood-gates, sluices, and other works belonging "to rivers and streams made navigable by act of parliament, "and for maintaining the navigation on *such* rivers and "streams," enacts, "that from and after the passing of "this act, if any person or persons shall wilfully *or* maliciously break, throw down, damage, or destroy, any "banks, flood-gates, sluices, or other works; or open or "draw up any flood-gate or flood-gates, or do any other "wilful hurt or mischief to any *such* navigation, so as to "obstruct, hinder, or prevent the carrying on, completing, "supporting, or maintaining such navigation; every such "person or persons shall be adjudged guilty of felony, and "the Court before whom such shall be tried and convicted "shall have authority to order such person or persons to "be transported for 7 years."

§ 33.

18. *Drainage Works, &c. in particular Places.*

In many instances particular provision has been made by the legislature against mischief of the sort now describing in particular places. Amongst others the following are to be found.

Powdike

Powdike in Marsh Land.

By stat. 22 Hen. 8. c. 11. reciting that ill-disposed persons had at divers times "maliciously cut, cast down, and "broken up parts of the dike called the *New Powdike*, in "marsh land in the county of Norfolk, and the broken "dike, otherwise called *Oldfield Dike*, by marsh land in "the Isle of Ely, in the county of Cambridge, by reason "whereof, &c. the ground and pastures within the country "of marsh land, in the counties aforesaid, have been "drowned, &c. and the inhabitants within the said marsh "land and the level of the same put to great charges," &c. enacts, "that every such perverse and malicious cutting "down and breaking up of any part or parts of the said "dikes, or of any other bank, being parcel of the rind "and uppermost part of the said county of marsh land "aforesaid, made for the defence and salvation of the same, "at any time from henceforth, by any person or persons "committed and done, otherwise than in working upon "the said banks or dikes, for the repairing, fortifying, and "mending of the same, be adjudged felony," &c.

22 H. 8. c. 11.

This statute, which stood repealed after the stat. 1 Ed. 6. c. 12. s. 4. and 1 Mar. st. 1. c. 1. s. 5. was revived by stat. 2 & 3 Ph. & M. c. 19.

§ 34.
Bedford level.
27 G. 2. c. 19.
Vide 11 Geo. 2. c. 34. 14 Geo. 2. c. 24. 13 Geo. 3. c. 45 & 60. 21 Geo. 2. c. 18. and 23 Geo. 3. c. 25.

By the stat. 27 Geo. 2. c. 19. for (amongst other things) the more effectually draining and preserving the North Bedford level, and divers lands adjoining thereto in the manor of Crowland (s. 49.) "For the preventing the damming "up, stopping, throwing down, burning, &c. or damaging "any of the rivers, drains, &c. or other works already made "or erected for or towards draining the lands and grounds "contained within the said several districts and divisions, or "any of them, or hereafter to be made, &c. for the purposes aforesaid, by virtue of or under the powers and authorities of this act, it is enacted, that if any person or "persons shall, at any time hereafter, maliciously cut, "break down, burn, demolish, or destroy, any bank, mill, "engine, flood-gate, or sluice already made or erected, or "which shall, at any time hereafter, be making or erecting, "or made or erected, supported or maintained, for answering

"ing

Ch. XXII. § 34. *Bedford level.*

" ing the purposes aforesaid; every person or persons so of-
" fending, being thereof convicted, shall be guilty of felony,
" without benefit of clergy. And if any person or persons
" shall, at any time hereafter, maliciously stop, dam, or de-
" molish, damage, or destroy any river, drain, water-course,
" door, dam, bridge, or other work or works already made
" or erected, or which shall at any time hereafter be ma-
" king or erecting, or made or erected, supported or main-
" tained, for answering the purposes aforesaid; every per-
" son or persons so offending, being thereof convicted be-
" fore any two or more justices of the peace for the coun-
" ties and isle aforesaid, or either of them, &c. shall forfeit
" 100*l.* to the commissioners, &c. and in default of payment
" be sent to the house of correction of the county or isle
" where such offence shall be committed, there to be kept
" to hard labour for such time as such justices shall direct,
" not exceeding six months."

§ 35. *Norfolk.* 42 Geo. 3. c. 22.

By an act of the 42 Geo. 3. c. 22. (of local acts) for inclosing and draining, &c. marsh lands and fens, &c. in the parish of Runham in the county of Norfolk, it is enacted, (s. 49.) " That if any person or persons shall wilfully and
" maliciously cut, damage, break down, demolish, or destroy
" any bank, mill, engine, dam, floodgate, bridge, sluice, or
" tunnel, already made, or which shall at any time hereafter
" be made or erected, supported, maintained, or used for
" answering any of the purposes of this act; every person
" so offending, and being convicted thereof, shall be deemed
" guilty of felony; and the Court before whom such person
" shall be tried and convicted shall have authority to cause
" such person or persons to be transported for 7 years, or in
" mitigation of such punishment may award such sentence
" as the law directs in cases of petit larceny."

§ 36. *Devon.* 42 Geo. 3. c. 32.

By stat. 42 Geo. 3. c. 32. for embanking and preserving from the sea certain lands situate between Great Prince Rock and the village of Crabtree, called Tothill Bay and Lipson Bay, near Plymouth in the county of Devon, it is enacted, (s. 46.) " That if any person or persons shall wilfully and maliciously
" break, throw down, damage, or destroy any of the banks,
" mounds, dams, or other works to be erected or made by
" virtue

" virtue of this act, every such person shall be deemed guilty Ch. XXII. § 36.
" of felony, and shall on being lawfully convicted thereof *Devon.*
" be subject to the like pains and penalties as in cases of
" felony; and the Court before whom such person shall be
" tried and convicted shall have authority to cause such
" person to be punished in like manner as felons, &c. or in
" mitigation of such punishment such Court may award
" such sentence as the law directs in cases of petit larceny."

19. *West-India Docks.*

§ 37.
West India docks.
39 Geo. 3. c. 69. (local.)

By the act of the 39 Geo. 3. c. 69. for improving the port of London, it is enacted, (s. 4.) that if any person or " persons whosoever shall wilfully and maliciously set on fire " any of the works to be made by virtue of this act, or any " ship or other vessel lying or being in the said canal, or in any " of the docks, basons, cuts, or other works to be made by " virtue of this act; every person so offending in any of the " said cases shall be adjudged guilty of felony without benefit " of clergy. And if any person or persons shall knowingly, " wilfully, or maliciously demolish, break down, cut or destroy " any of the works to be made by virtue of this act, or any ship " or vessel lying in the said canal, or in any of the said docks, " basons, cuts, or other works; then every such offender, being " convicted thereof, shall suffer punishment by fine, imprison- " ment, or transportation, at the discretion of the Judge, &c. " before whom such offender shall be tried and convicted."

Destroying mooring ropes, &c. in certain places in the Thames.

By s. 105. " In case any person or persons whosoever " shall wilfully or maliciously cut, break, or in any manner " destroy any rope or other thing by which any ship or other " vessel lying in the said canal, or in any of the said docks, " basons, or cuts, *or in any place or places in the River Thames,* " *between London Bridge and the mouth of the River Lea,* *Vi.* post. c. 44. " shall be moored or fastened, such person or persons shall, " for every such offence, forfeit and pay a sum not exceeding " 10*l.*" &c.

20. *The King's Ships, Dock Yards, &c.*

§ 38.
King's ships, docks, stores, &c.
12 Geo. 3. c. 24.

The offence of embezzling the King's stores has been before treated of; and further the stat. 12 Geo. 3. c. 24. entitled Ante, 621.

Ch. XXII. § 39. titled "An act for the better securing and preserving his
King's ships, docks, &c. "Majesty's dock-yards, magazines, ships, ammunition and "stores," reciting that "Whereas the safety and preserva- "tion of his Majesty's ships of war, arsenals, magazines, "dock yarks, rope yards, victualling offices, military, naval, "and victualling stores, and the places where such stores "are kept or deposited, either within this realm, or in any "of the islands, countries, forts, or places thereunto belong- "ing, is of great importance to the welfare and security of "the kingdom;" enacts, "that if any person or persons shall,
Wilfully setting on fire, &c. ships of war, dock-yards, &c. felony without clergy. "either within this realm, or in any of the islands, countries, "forts, or places thereunto belonging, wilfully and malici- "ously set on fire, or burn or otherwise destroy, or cause to "be set on fire, or burnt or otherwise destroyed, or aid, pro- "cure, abet or assist in the setting on fire, or burning, or "otherwise destroying of any of his Majesty's ships or vessels "of war, whether the said ships or vessels of war be on float "or building, or begun to be built in any of his Majesty's "dock-yards, or building or repairing by contract in any pri- "vate yards, for the use of his Majesty; or any of his Ma- "jesty's arsenals, magazines, dock-yards, rope-yards, victual- "ling offices, or any of the buildings erected therein or be- "longing thereto; or any timber or materials there placed, "for building, repairing, or fitting out of ships or vessels; or "any of his Majesty's military, naval, or victualling stores, "or other ammunition of war; or any place or places where "any such military, naval, or victualling stores, or other am- "munition of war is, are, or shall be kept, placed, or depo- "sited; that then the person or persons guilty of any such "offence, being thereof convicted in due form of law, shall "be adjudged guilty of felony, without benefit of clergy."

Trial. By s. 2. "any person who shall commit any of the offences "before mentioned, in any place out of this realm, may be "indicted and tried for the same, either in any shire or county "within this realm, in like manner and form as if such of- "fence had been committed within the said shire or county, "or in such island, country, or place where such offence shall "have been actually committed, as his Majesty, his heirs "&c. may deem most expedient for bringing such offender to "justice; any law, usage, or custom notwithstanding."

Vide 22 Geo. 2. c. 33. Cognizance of similar offences is given to Courts Martial by the naval articles of war, s. 24. and 25.

21. *Pri-*

21. *Private Ships, Wrecks, &c.*

§ 39.
Private ships.
22 & 23 Car. 2. c. 11.
Wilful destruction of ships, felony.
Vide ante, 800.

The stat. 22 & 23 Car. 2. c. 11. s. 12. reciting that "it often happens that masters and mariners of ships having insured or taken upon bottomry greater sums of money than the value of their adventure, do wilfully cast away, burn, or otherwise destroy the ships under their charge, to the merchants and owners great loss; for the prevention thereof for the future enacts, that if any captain, master, mariner, or other officer belonging to any ship shall wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, he shall suffer death as a felon."

1 Ann. st. 2. c. 9. s. 4.

By stat. 1 Ann. st. 2. c. 9. s. 4. "For the effectual preventing the wilful casting away, burning, or otherwise destroying by masters and mariners of ships under their charge, it is enacted, that if any captain, master, mariner, or other officer belonging to any ship, shall, after the 12th of February 1702, wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants who shall load goods thereon, he shall suffer death as a felon."

Trial.
Vide post.

And by s. 5. "all and every the said offence and offences committed on the high seas, or where the Admiralty hath jurisdiction, shall be inquired of, tried, &c. and judged in such shires and places in the realm as shall be limited by the Queen's commission under the great seal, in such manner and form as by stat. 28 Hen. 8. c. 15. is directed for the trial of pirates, and all and every person and persons who shall be convicted of any of the said offence or offences last mentioned, or shall stand mute, or preremptorily challenge above 20 of the jury, shall suffer death without benefit of clergy."

Vide tit. *Piracy.*

Excluded clergy.

§ 40.
Ships in distress of stranding.
12 Ann. st. 2. c. 18.

The stat. 12 Ann. st. 2. c. 18. entitled "An act for preserving all such ships and goods thereof which shall happen to be forced on shore or stranded upon the coasts of this kingdom or any other of her Majesty's dominions," reciting "that great complaints had been made by merchants,

"as

Ch. XXII. § 40. *Ships.* " as well her Majesty's subjects as foreigners trading to and " from this kingdom, that many ships of trade have un- " fortunately near home run on shore or been stranded on " the coast thereof, and that such ships have been barba- " rously plundered by her Majesty's subjects, and their car- " goes embezzled," &c. provides that the sheriffs and other peace officers, &c. and officers of the customs, shall, on the application of any commander, or chief officer " of any ship " or vessel of any of her Majesty's subjects or others being " in danger of being stranded or run on shore, or being " stranded or run on shore," give their assistance, &c. and are empowered to command the constables of the nearest ports to summon as many men as shall be necessary to assist, &c.; and if there be any man of war, or merchant ship or vessel riding at anchor near, any of the said officers of the customs or constables are required to demand assistance of the superior officers of such ship, to aid such vessel in distress, who in case of refusal or neglect, shall forfeit 100*l.* to be recovered in an action of debt, &c. by the superior officer of the ship so in distress.

Persons entering ship without leave,

By s. 3. " If any person or persons whatsoever (besides " those empowered by the said officer of the customs, or his " deputy, or the constables as aforesaid) shall enter or en- " deavour to enter on board any such ship or vessel so in " distress as aforesaid, without the leave or consent of the " commander or other superior officer of the said ship, or " of the said officer of the customs, &c. or some or one of " them employed for the service and preservation of the said " ship or vessel as aforesaid; or in case any person shall mo- " lest him, them, or any of them in the saving of the said " ship, vessel, or goods, or shall endeavour to impede or " hinder the saving of any such ship, vessel, or goods; or " when any such goods are saved, shall take out or deface " the marks of any such goods, before the same shall be ta- " ken down in a book or books for that purpose provided " by the commander or ruling officer and the first officer of " the customs as aforesaid; such person or persons shall " within 20 days, make double satisfaction to the party " grieved, at the discretion of the two next justices of peace, " or in default thereof shall, by such justices of peace, be " sent to the next house of correction, where he shall con- " tinue

or molesting or hindering others in saving the ship. Vide post. 1100. st. 26 Geo. 2.

shall make double satisfaction to party grieved at discretion of two magistrates, or be sent to house of correction for 12 months.

" tinue and be employed in hard labour by the space of 12 " months then next ensuing. And that it shall be lawful " for any commander or superior officer of the said ship or " vessel so in distress as aforesaid, or for the said officer of " the customs or constables on board the same ship or ves- " sel, to repel by force any such person or persons as shall " without such leave or consent from the said commander " or superior officer, or the said officer of the customs or " his deputy, or such constables as aforesaid, press on board " the said ship or vessel so in distress, as aforesaid, and there- " by molest them in the preservation of the said ship or ves- " sel so in distress as aforesaid."

§ 41. *Making holes in such ship in distress, &c felony without clergy. Vide* ante, 648.

Then by s. 5. " If any person or persons shall make or " be assisting in the making any hole in the bottom, side, " or any other part of any ship or vessel so in distress as " aforesaid, or shall steal any pump belonging to any ship or " vessel so in distress as aforesaid, or shall be aiding or abet- " ting in the stealing such pump as aforesaid, or shall wilfully " do any thing tending to the immediate loss or destruction " of such ship or vessel; such person or persons shall be guilty " of felony, without benefit of clergy.

Made perpetual by 4 Geo. 1. c. 12. *Saving Admiralty jurisdiction of Cinque Ports.*

This act was made perpetual by the stat. 4 Geo. 1 c. 12. with a proviso (s. 2.) saving the Admiralty jurisdiction of the Cinque Ports, and the officers thereto belonging, who are empowered to put the act in force within their jurisdiction.

4 Geo. 1. c. 12. *Owners, masters, or mariners destroying ships to the prejudice of underwriters, &c. death.*

And by s. 3. " for the effectual preventing the wilful " casting away, burning, or otherwise destroying of ships by " the owners, masters, and mariners thereof and thereto be- " longing, it is enacted, that if any owner of, or captain, " master, mariner, or other officer belonging to any ship, " shall, after the 24th of June 1718, wilfully cast away, " burn, or otherwise destroy the ship of which he is owner, " or unto which he belongeth, or in any manner of wise di- " rect or procure the same to be done to the prejudice of " any person or persons that shall underwrite any policy or " policies of insurance thereon, or of any merchant or mer- " chants that shall load goods thereon, he shall suffer death."

11 Geo. 1. c. 29. s. 5. & 6. *Wilfully destroying ships by owner, master, or*

This provision is explained and enforced by the stat. 11 Geo. 1. c. 29. s. 5. & 6., which reciting the last-mentioned act, and that " some doubts had arisen touching the nature

Ch. XXII. § 41. *Ships.*

of "the offence provided against by the said recited act, "and the trial and punishment to be had and inflicted for "the same, therefore enacts and declares that if any owner "of, or captain, master, officer or mariner belonging to any "ship or vessel, shall, after the 24th of June 1725, wilfully "cast away, burn, or otherwise destroy the ship or vessel "of which he is owner, or to which he belongeth, or in "anywise direct or procure the same to be done, with in- "tent or design to prejudice any person or persons that hath "or shall underwrite any policy or policies of insurance "thereon, or of any merchant or merchants that shall load "goods thereon, or of any owner or owners of such ship "or vessel; the person or persons offending therein, being "thereof lawfully convicted, shall be deemed and adjudged "a felon or felons, and shall suffer as in cases of felony, "without benefit of clergy."

mariner, to prejudice insurers thereon, or merchants having laden goods on board, felony without clergy. Vide post.

Trial. Vide Rex v. Snape and Aires, ante, 807. and post. st. 26 G. 2. c. 19. s. 8.

Sect. 7. enacts, "that if any of the said offences, in wil- "fully casting away, burning, or otherwise destroying any "ship or vessel as aforesaid, shall be committed within the "body of any county of this realm, the same shall and may "be inquired of, tried, determined, and adjudged in the "same Courts, in such manner and form as felonies done "within the body of any county by the laws of this realm "are to be inquired of, &c. And if any of the said of- "fences shall be committed upon the high seas, the same "shall be inquired of, &c. before such court, and in such "manner and form as by stat. 28 Hen. 8. (c. 15.) entitled "*for pirates*, is directed and appointed for the inquiring, &c. "of felonies done upon the high seas."

§ 42. *What a casting away or destroying.*

Upon the construction of the acts of the 4 & 11 Geo. 1. it has been ruled, that if the ship be only run aground or stranded upon a rock, and be afterwards got off in a condition capable of being easily refitted, she cannot be said to be *cast away or destroyed;* and therefore it is not within either of these statutes. Upon this distinction Augustin de Londo, the master of a Spanish vessel, called El Principi de Espana, was acquitted at an Admiralty session holden before Sir T. Salusbury, and Yates and Aston, justices.

De Londo's case, Admiralty, 9th July 1765, 2 MS. Sum. 325.

To the prejudice of underwriters. 2 MS. Sum. 325.

If the insurance be only on the cargo, and not on the ship, it is not within that branch of the statutes relating to the prejudice

prejudice of underwriters; for the words are "to the pre-"judice of any person that shall underwrite any policy of "insurance *thereon*," ships only being before-mentioned; and penal statutes are to be construed strictly.

Pow's case, O. B. 1754, 1 Leach, 54. *A person who is accessary to a felonious shipwreck is not within* 4 Geo. 1. c. 12. *unless he belong to the ship.*

At the Admiralty Sessions holden at the Old Bailey on the 25th of February 1754, before Adams B., Sir Thomas Salusbury Knt. Judge of the court of Admiralty, Sir T. Birch Knt. and others, John Lancey and John Lloyd were indicted on the stat. 11 Geo. 1. c. 29. for unlawfully burning and destroying the ship Nightingale, whereof T. Benson was owner, with intention to defraud the underwriters therein named; and Thomas Pow was charged in the same indictment as an accessary before the fact, for counselling and advising the said Lancey and Lloyd to commit the felony aforesaid. It appeared in evidence that Benson, the owner of the ship, rented the island of Lundy, situated in the mouth of the Bristol channel, near the middle, between Devonshire and Pembrokeshire, (long. 4. 40. W., lat. 60. 25. N.) but within the county of Devon. That Pow was a taylor and salesman, living near the point of Appledore, a town in Kent. That the ship was freighted with salt, dry goods, maunds of pewter, and a cask of combustibles, and insured by Benson for 400*l.* from Appledore to Maryland. That Pow shipped the seamen on board at Appledore, and she sailed from thence to Lundy island, where the dry goods and pewter were unloaded and buried under ground among the rocks. That while the vessel lay in Lundy road, in fourteen fathoms water, Pow went on board her, and gave several of the crew notes of hand, promising to pay them a certain sum of money, as a compensation for their clothes, &c. *in case the ship was lost by any misfortune between that place and the cape of Virginia on her outward-bound passage.* That Pow returned on shore; the ship set sail; and the morning after, Lancey the captain gave orders to set the ship on fire, which was accordingly done. The jury acquitted Lloyd, and found Lancey guilty (*a*). They also found specially, "That Thomas Pow, before the said felony "was committed by Lancey, did, near the island of Lundy "within the county of Devon, incite, &c. and counsel the

(*a*) He was executed at Execution Dock on Friday June 7th, 1754.

"said

Ch. XXII. § 42. *Ships.*

" said John Lancey to commit the same; but that the said " T. Pow was neither owner, master, captain, or mariner " of the said ship."

Upon the verdict two questions were submitted to the opinion of the Judges: first, Whether an accessary upon the land to the offence of burning a ship, which offence is afterwards committed upon the high seas, be within the jurisdiction of the court of Admiralty? or, Whether he ought not to be indicted and tried at the assizes for the county within which his offence was committed? secondly, Whether Thomas Pow, being a person in trade, living at Appledore point, and found by the verdict not to be either owner, master, captain, or mariner of the vessel burnt, were within the meaning of the stat. 4 Geo. 1. c. 12. explained by 11 Geo. 1. c. 29. s. 6, upon which the indictment was founded; that statute only saying, " That if any owner, captain, master, " mariner, or other officer belonging to any ship, shall wil- " fully burn," &c.? The Judges were of opinion, that Thomas Pow, upon the finding of the jury, was not an offender within the meaning of the stat. 4 Geo. 1. c. 12. but they gave no opinion upon the first point.

§ 43. *Offences against ships by strangers.*

Many offences however of this nature may be committed by persons not belonging to the particular ship.

Plunder or destruction of goods on board ships.

Thus the entering by force on board any ship in distress, and destroying the marks on the goods, is punishable as a misdemeanor on summary conviction before magistrates by the stat. 12 Ann. st. 2. c. 18. s. 3. in the manner and under the circumstances therein set forth. The principal object of that provision was certainly to guard against thievery and plunder. With the same view the stat. 8 Geo. 1. c. 24. before stated punishes as pirates such as forcibly enter merchant ships, and throw overboard or destroy any part of the goods or merchandizes belonging to the same, though the ship itself be not carried off. And this was again followed up by the stat. 26 Geo. 2. c. 19. s. 1. whereby " If any per- " son or persons shall plunder, steal, take away, or *destroy* " any goods or merchandizes or other effects, from or belong- " ing to any ship or vessel of his Majesty's subjects or others, " which shall be in distress, or which shall be wrecked, " lost, stranded, or cast on shore in any part of his Majesty's

12 Ann. ante, 1095.

8 Geo. 1. c. 24. ante, p. 801.

26 Geo. 2. c. 19. s. 1. *vide* ante, 648. & 422.

" jesty's dominions, (whether any living creature be on board such vessel or not (*a*),) or any of the furniture, tackle, apparel, provision, or part of such ship or vessel; or shall beat or wound with intent to kill or destroy, or shall otherwise wilfully obstruct the escape of any person endeavouring to save his or her life from such ship or vessel, or the wreck thereof: or if any person or persons shall put out any false light or lights, with intention to bring any ship or vessel into danger; then such person or persons so offending shall be deemed guilty of felony, and being lawfully convicted thereof, shall suffer death as in cases of felony, without benefit of clergy."

Ch. XXII. § 43. *Ships.*

Obstructing the escape of any person from wreck. Ante, 422.

Putting out false lights to bring ships into danger.

The act then makes several provisions against the plundering of vessels lost or stranded, and for the detection and punishment of offenders. And then by s. 8. regulates the trial in manner before stated,

Trial. Ante, 649.

S. 12. empowers any one justice of the peace, or more " in case of need and in the absence of the sheriff, to take " sufficient power of the country to repress all unjust vio- " lence, and duly to enforce the execution of the act."

Justices of peace may take force to repress violence.

S. 16. enacts that the stat. 12 Ann. st. 2. c. 18. and 4 Geo. 1. c. 12. " shall in all things remain in full force " save only so far as the same are altered or changed by this " present act."

By s. 18. the act is not to extend to Scotland.

Again by stat. 2 Geo. 3. c. 28. s. 13. for the preventing thefts and frauds by persons navigating boats on the river Thames; " If any person or persons shall cut, damage, or " spoil, any cordage, cable, buoys, buoy rope, head-fast, " or other fast, fixed to any anchor or moorings belonging " to any ship or vessel at anchor or mooring in the river " Thames, or any rope used for the purpose of mooring " or rafting masts or timber; or shall be aiding or assisting " therein; with an intent to steal the same; such person " or persons shall, being convicted thereof on the oath of " two or more credible witnesses, be transported to some of " his Majesty's plantations in America for 7 years, accord- " ing to the laws now in force for the transportation of " felons."

§ 44. *In Thames.* 2 Geo. 3. c. 28. *Cutting or damaging cordage, &c. with intent to steal, transportation.* Ante, s. 37.

(*a*) *Vide* ante, 648. *n.*

As

Ch. XXII. § 44. *Ships.* As this clause does not expressly declare the offenders to be felons, it is subject to the like observations as were before noted in respect of the preceding clause of the same statute against receivers of goods stolen from such ships: and seems by the opinion of the legislature expressed in the stat. 39 & 40 Geo. 3. c. 87. s. 22. to rest in misdemeanor.

Ante, 753, 4.

Obstructing execution of act. Also by s. 19. "In case any person or persons acting in "the execution of any of the powers granted by this act, "shall be obstructed therein; every person so obstructing, "and all such as shall act in their assistance, shall, on being "thereof convicted before the justices of the peace at the "general or quarter sessions of the county or city adjoining "to the said river, upon the oath of two or more credible "witnesses, be transported to any of his Majesty's planta- "tions in America for seven years, according to the laws "now in force for the transportation of felons."

This by s. 23. shall be deemed a public act.

§ 45. *King's ships wilfully or negligently running down, &c. others.* 22 Geo. 2. c. 33. Also the naval articles of war provide, by article 26. that "Care shall be taken in the conducting and steering of any "of his Majesty's ships, that through wilfulness, negligence, "or other defaults, no ship be stranded, or run upon any "rocks or sands, or split, or hazarded; upon pain that such "as shall be found guilty therein be punished with death, "or such other punishment as the offence by a court mar- "tial shall be judged to deserve."

§ 46. 33 Geo. 3. c. 67. *Seamen, &c. wilfully setting fire to any ship, to suffer death;* By stat. 33 Geo. 3. c. 67. s. 3. (made perpetual by stat. 41. Geo. 3. c. 19.) "If any seaman, keelman, caster, or ship "carpenter, or other person or persons, shall, at any time "after the 24th of June 1793, wilfully and maliciously "burn or set fire to any ship, keel, or other vessel; every "person so offending, and being thereof lawfully convicted, "in any court of oyer and terminer, to be holden in and "for the county, &c. or district wherein the offence was "committed, shall be adjudged guilty of felony without "benefit of clergy."

and destroying or damaging them by any other means, to be transported. And by s. 6. "If any seaman, keelman, caster, ship- "carpenter, or other person or persons, shall after the 24th "of June 1793, wilfully and maliciously destroy or damage "any ship, keel, or other vessel, (otherwise than by fire,)

"every

" every seaman, keelman, caster, ship-carpenter, and other Ch. XXII. § 46.
" person so offending, and being thereof lawfully convicted *Ships.*
" upon any indictment to be found against him, her, or
" them, in any court of oyer and terminer, or general or
" quarter sessions of the peace, to be holden respectively in
" and for the county, &c. or district wherein the offence
" was committed, shall be adjudged guilty of felony, and
" shall be transported to some of his Majesty's dominions
" beyond the seas, for any space of time or term of years
" not exceeding 14 years nor less than seven years."

By s. 7. in case any of the said offences shall be committed *Trial.*
" on the high seas, then and in every such case the offence
" or offences so committed shall be triable, and the person
" or persons so offending may be prosecuted and tried by
" virtue of this act in any session of oyer and terminer and
" gaol delivery, for the trial of offences committed on the
" high seas, within the jurisdiction of the Admiralty of
" England," &c.

By s. 8. " No person shall be prosecuted by virtue of this *Limitation.*
" act for any of the offences aforesaid, unless such prosecu-
" tion be commenced within 12 calendar months after the
" offence committed."

CHAP. XXIII.

THREATENING LETTERS OR WRITINGS.

The Statutes. - - - - §1.

By Stat. 9 Geo. 1. c. 22. sending Letter without Name, or with fictitious Name, demanding Money, Venison, or other valuable Thing, or rescuing any Offender in Custody for the same, &c. Felony without Clergy. *ib.*

Extended by Stat. 27 Geo. 2. c. 15. to sending such Letter, threatening to kill any Person, or burn their Houses, &c. though no valuable Thing be demanded. *ib.*

By Stat. 32 Geo. 2. c. 24. sending or delivering Letter, or Writing, with or without Name, or with fictitious Name, threatening to accuse another of Offence punishable with Death, Transportation, or infamous Punishment, with Intent to extort Money, Goods, Wares, or Merchandizes, punishable as Misdemeanor, or with Transportation. *ib.*

By Stats. 12 Geo. 1. c. 34. and 22 Geo. 2. c. 27. writing or sending any Letter, or other Writing, or Message to Masters by Persons employed in the Woollen, Felt, Hat, Silk, Mohair, Fur, Hemp, Flax, Linen, Cotton, Fustian, Iron, or Leathern Manufactures; Felony, and Transportation. *ib.*

Construction of the Statutes.

What Letters within them. - - §2.

A Letter signed with initials is a Letter *without a Name*, within the Stat. 9 Geo. 1. *ib.*

Demanding, within that Statute, means an asking accompanied with express or implied Threat *in case of* Non-

Non-compliance. *ib.* And though the Threat be of a Charge of Murder, it is Felony within that Statute if there be an actual Demand; for the Stat. 30 Geo. 2. c. 24. which makes it a Misdemeanor, only reaches Cases falling short of an actual Demand. - § 2.

A Bank Note is a valuable Thing within the Stat. 9 Geo. 1. *ib.*

A Letter containing a Threat to set Fire to *Prosecutor's Mill* in which he had *then no Property*, held not within the Stat. 27 Geo. 2. c. 15. *ib.*

So a Threat by Prisoners to do *all the public Injury they were able* to Prosecutor's Farms, &c. held not necessarily to imply a *Burning* within the same Statute. *ib.*

But a Letter accusing Prosecutor of having taken away the Life of a Friend of the Writer's, who was come to revenge him, is Evidence to go to the Jury of sending a Letter threatening to kill and murder Prosecutor. *ib.* (& s. 4.)

A threatening Letter referring to such Circumstances as were plainly intended to denote the Writer, as by making Demand of a particular Sum in Controversy between him and the Prosecutor is not within the Stat. 9 Geo. 1. or 27 Geo. 2. although no Name be subscribed. *ib.*

Distinctions between the several Statutes. - § 3.

As to the Offence—Names, &c. to the Letters—Letters or Writings—Things demanded—Intent, &c. *ib.*

Indictment on Stat. 30 Geo. 2. c. 24. for sending threatening Letter with Intent to extort *Money*, not proved by shewing a Letter containing a Threat of a false Accusation, if he did not give up a *Bill of Exchange* drawn by the Writer. *ib.*

What a Sending of the Letter. - - § 4.

Distinguished by the Stat. 30 Geo. 2. from a *Delivery*. *ib.*

Where the *Wife wrote* a threatening Letter, and the *Husband delivered it* to Party threatened; held that the Husband, though privy to the Writing, was not

within Stat. 9 Geo. 1. or 27 Geo. 2.; nor could the Wife alone be convicted, unless she wrote and sent it without her Husband's Privity. - § 4.

Evidence that Prisoner delivered a threatening Letter sealed up to another, by whom it was put in the Post, and so conveyed to Prosecutor, is sufficient to go to the Jury of a Sending such Letter knowing the Contents. *ib.*

So throwing the Letter into Prosecutor's Yard, where it was taken up by his Servant and carried to him, is a *Sending*. *ib.*

So dropping it in a Room frequented by Prosecutor, where it was picked up by one and given to him. *ib.*

Indictment and Evidence. - - § 5.

The *Letter* itself must be set forth in the Indictment. *ib.*

The Precedents in general allege that the Letter was sent *to* the Party: but said to be sufficient to allege that it was *sent directed to* the Prosecutor. *ib.*

But Evidence of sending the Letter by the Post, or dropping it where it is likely to be picked up and given to Prosecutor, by whom it is afterwards received, is Evidence of a *Sending to* him. *ib.*

Prior and subsequent Letters to the one stated in the Indictment may be given in Evidence to explain it. § 6.

Trial. - - - - § 7.

May be in any County under Stat. 9 Geo. 1. And under the other Statutes may be in the County where the Letter was *received*, though sent in the first Instance by the Prisoner in another County. *ib.*

Threatening Letters or Writings.

§ 1. *General view of the offences in the statutes.* 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 42.

THE occasion and object of the laws in force against the offence of sending threatening letters and writings to others are well explained in the preamble of the Black Act, which recites that ill-designing and disorderly persons had of late associated themselves, &c. " and had sent letters in fictitious

" titious names to several persons demanding venison and " money, and threatening some great violence if such their " unlawful demands should be refused, or if they should be " interrupted in or prosecuted for such their wicked prac- " tices; and had actually done great damage to several per- " sons who have either refused to comply with such demands, " or have endeavoured to bring them to justice:" and then enacts, that " if any person or persons (whether armed or " disguised or not) shall knowingly send any letter without " any name subscribed thereto, or signed with a fictitious " name, demanding money, venison, or other valuable " thing; or shall forcibly rescue any person being lawfully " in custody of any officer or other person for any such of- " fence; or if any person or persons shall by gift or promise " of money or other reward procure any of his Majesty's " subjects to join him or them in any such unlawful act; " every person so offending, being thereof lawfully convict- " ed, shall be adjudged guilty of felony without benefit of " clergy."

Sending letter without name, or with fictitious name, demanding any valuable thing, felony without clergy.

By s. 4. such offenders not surrendering themselves when demanded by the King's proclamation, and making full confession of their accomplices, are made guilty of felony without benefit of clergy. And by s. 5. persons who after the time for such surrender expired shall " conceal, aid, abet, or succour any such offender, knowing him to have been so charged, and to have been required to surrender by such order," shall on conviction be guilty of felony without benefit of clergy.

Surrender clause, vide Process to bring in party.

By s. 14. such offences may be tried in any county of England.

Trial. Post. 1125.

Then the stat. 27 Geo. 2. c. 15. reciting the said law, and " that divers letters had been sent to several of his Majesty's " subjects threatening their lives, or the burning their houses, " which letters not demanding money, venison, or any " valuable effects, were not subject to the penalties of the " said act; to prevent the like mischievous and iniquitous " proceedings for the future," enacts, that " if any person " or persons, after the 1st of May 1754, shall knowingly " send any letter without any name subscribed thereto, or " signed with a fictitious name or names, letter or letters, " threatening to kill or murder any of the King's subject or " subjects,

27 Geo. 2. c. 15. *Extends to sending such letters, threatening to kill, &c. or burn houses, &c. though no valuable thing be demanded.*

Ch. XXIII. § 1. *Statutes.*

" subjects, or to burn their houses, outhouses, barns, stacks " of corn or grain, hay, or straw; though no money or " venison, or other valuable thing shall be demanded in or " by such letter or letters; or shall forcibly rescue any per- " son being lawfully in custody of any officer or other person " for the said offence; every person so offending, being " thereof lawfully convicted, shall be adjudged guilty of " felony without benefit of clergy."

30 Geo. 2. c. 24. *Sending letter or writing with or without names, or with fictitious names, &c. threatening to accuse another of offence punishable with death, transportation, or infamous punishment, with intent to extort; punishable as misdemeanor or with transportation.*

Lastly, by stat. 30 Geo. 2. c. 24. s. 1. " All persons who " shall (after the 29th of September 1757) knowingly send or " deliver any letter or writing with or without a name or " names subscribed thereto, or signed with a fictitious name " or names, letter or letters, threatening to accuse any per- " son of any crime punishable by law with death, transporta- " tion, pillory, or any other infamous punishment, with a " view or intent to extort or gain money, goods, wares, or " merchandizes from the person or persons so threatened to " be accused, shall be deemed offenders against law and the " public peace; and the Court before whom such offender " or offenders shall be tried shall, in case he, she, or they be " convicted of any of the said offences, order such offender " or offenders to be fined and imprisoned, or to be put in the " pillory, or publicly whipped, or to be transported as soon " as they conveniently may be (according to the laws made " for transportation of felons) to some of his Majesty's colo- " nies or plantations in America for the term of 7 years, " as the Court shall think fit to order."

Sending threatening letters or messages to master manufacturers in certain trades. 12 Geo. 1. c. 34. *Vide* ante, tit. *Assault*, 426.

By the stat. 12 Geo. 1. c. 34. s. 6. " If any person or " persons shall write, or cause to be written, or knowingly " send, or cause to be sent, any letter, or other writing, or " message, threatening any hurt or harm to any master " wool-comber, or master weaver, or other person concern- " ed in the *woollen manufacture*, or threatening to burn, pull " down, or destroy any of their houses or outhouses, or to " cut down or destroy any of their trees, or to maim or kill " any of their cattle, for not complying with any demands, " claims, or pretences of any of his or their workmen, or " others employed by them in the said manufacture, or for " not conforming, or not submitting to any such (*a*) illegal " by-laws, ordinances, rules, or orders as aforesaid; every " person so knowingly or willingly offending in the premises,

(*a*) *Vide* ante, 426.

" being

" being thereof lawfully convicted, upon any indictment " to be found within twelve calendar months next after any " such offence committed, shall be adjudged guilty of felony, " and shall be transported for 7 years to some or one of his " Majesty's colonies or plantations in America, by such ways " and means, and in such manner, and under such pains " and penalties as felons in other cases are by law to be " transported."

Ch. XXIII. § 1. *Statutes.*

Felony and transportation.

Then the stat. 22 Geo. 2. c. 27. s. 12. reciting the above-mentioned law, and " that it was necessary that the said se- " veral provisions and regulations in the said last in part " recited act should be extended to journeymen dyers, " journeymen hot-pressers, and all other persons employed " in the woollen manufactures of this kingdom, and also to " journeymen, servants, workmen, and labourers employed " in the making of felts or hats, and in the manufactures of " silk, mohair, fur, hemp, flax, linen cotton, fustian, iron " and leather, or any manufactures made up of wool, fur, " hemp, flax, cotton, mohair or silk, or of any of the said " materials mixed one with another;" therefore enacts, " That the said several before-recited clauses in the said act, " made in the 12th year of his said late Majesty's reign, and " all the provisions, regulations, pains, penalties and for- " feitures therein contained, shall from and after the 24th " of June 1749 extend and be construed, deemed, and ad- " judged to extend to journeymen dyers, journeymen hot- " pressers, and all other persons whatsoever employed in or " about any of the *woollen manufactures* of this kingdom; " and also to journeymen, servants, workmen, and labour- " ers, and all other persons whatsoever employed in the " making of *felts*, or *hats*, or in or about any of *the manu-* " *factures of silk, mohair, fur, hemp, flax, linen, cotton, fustian,* " *iron, or leather*, or in or about any manufactures made up of " *wool, fur, hemp, flax, cotton, mohair, or silk*, or of any of *the* " *said materials mixed one with another*, in as full and ample " manner as the said provisions, regulations, pains, penal- " ties, and forfeitures are by the said last-mentioned act de- " clared to extend to the several and respective persons " therein named; and the pains, penalties, and forfeitures " which shall be incurred by reason of any offence com- " mitted against the said last-mentioned act, by any person

22 Geo. 2. c. 27. s. 12.

The provisions in the recited act, to extend to persons employed in the manufactures enumerated.

" or

Ch. XXIII. § 1. *Statutes.*

" or persons employed or concerned in or about any of the " said manufactures hereinbefore enumerated, shall be in- " flicted, levied, and recovered in the same manner as the " pains, penalties, and forfeitures contained in the said last " in part recited act are directed to be inflicted, levied, and " recovered upon and against the several and respective per- " sons therein mentioned."

§ 2. *Construction of the statutes.*

The following cases have occurred on the construction of these statutes:

Robinson's case, O. B. Feb. 1796, cor. Lawrence J. MS. Buller J. and MS. Jud. (2 Leach, 869. S. C.) *Vide* Sess. Papers, p. 394. for the detail of the evidence.

Michael Robinson was tried on an indictment charging him with having unlawfully and feloniously, &c. sent a certain letter dated the 12th of January 1796, *without any name subscribed thereto*, to James Oldham Oldham, *demanding* of him *a certain valuable thing*, viz. *a bank note*, against the form of the statute, &c.

Sending a threatening letter signed R. R. *demanding a Bank-note, and threatening in case of refusal to publish a libel charging the prosecutor with murder, is a capital felony within the stat.* 9 Geo. 1. c. 22. *which act is not repealed in that respect by the stat.* 30 Geo. 2. c. 24. *which only reaches cases falling short of an actual demand, where at the same time the letter is sent with a view or intent to extort money, &c. and which by the latter act is made a misdemeanor only.*

It appeared in evidence that the prosecutor had served an apprenticeship with one Daniel Dolly, by whom he was afterwards taken into partnership. That upon Dolly's death, which happened a few years afterwards, a report was spread that the prosecutor had been the author of his death, upon which he brought an action against two persons, and had judgment against them. That before the letter in question was sent, several other letters had been written by the prisoner to the prosecutor, to which he returned answers for the purpose of obtaining information of the prisoner's place of abode to bring him to justice. All these letters were read in evidence, as they served to explain the letter upon which he was indicted. They contained an intimation that another person who was a friend of the writer, who was in distress, had put certain MS. into his hands, containing a charge of the prosecutor's having murdered his former master, Dolly, and afterwards married the widow his accomplice: that the prisoner was unwilling to publish the MS. containing so serious a charge without giving a previous intimation to him, and hearing what he had to propose upon the subject. The letter for sending which the prisoner was indicted, addressed to the prosecutor, contained a threat to publish the said libel on him, imputing to him the murder of Dolly, and was as follows:

A BANK NOTE IS A VALUABLE THING, *within*

" Tuesday,

" Tuesday, 12th January 1796. Ch. XXIII. § 2.

" Sir,

I am well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking. An understanding on such a matter as this is the easiest thing imaginable, and in repeating that you will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage as of wantonly sporting with the feelings of any one, &c. The subject on which I have have addressed you has long lain dormant; and it was because I thought the attack of a most serious complexion that I hesitated for such a length of time in giving my countenance to it: not that I ever sought for any circumstances to influence my judgment or qualify my opinion; and for aught that has ever come to my knowledge it may be all the moonshine of the moment. I am therefore so far candid, and I trust not indelicate, and it will at least be a satisfaction to you to be told, (&c.) that not a soul but myself is in possession of a line of the MS.; nor has it ever been out of my hands, or perused or heard by any person living since first I had it: so that *when* it is committed to the flames all will necessarily die with it. Of this you shall have a testimony so clear and unequivocal, that it will not be possible for you afterwards to doubt. Thus much I have suggested for *your* satisfaction. You will now give me leave to say something of the cause I have engaged in. I have no objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must beg leave to adjust; perhaps I may be more anxious to urge them in order to have some proof of your sincerity, after which I am at your service. In order to relieve a destitute and unhappy person struggling with sickness and with sorrow, will you permit me to be your almoner? Will you enable me to dispose of a little of your money as I shall see occasion? It is a duty I owe the cause of humanity to urge it. Remember, Sir, I am now only making an appeal to your *benevolence*. I am holding out no delusions to exact the involuntary tribute: I am asking you as a gentleman, as a man, to give me some earnest of your intentions to prove what I am so strongly inclined to give you credit for. *Inclose a bank note in a letter addressed to R. R.*, and let it be left at the Cambridge

What letters within the acts.

the meaning of the stat. 9 Geo. 1. *though not the subject of larceny at the time of passing the act.*

It is sufficient if it be a valuable thing at the time of the demand made.

A mere asking of charity is not a demand within the act, but it must be accompanied with some express or implied threat: a requisition which may operate as a force on the mind of the person to whom it is addressed.

But whether a letter contain such a demand is a matter of construction on which the Court will instruct the jury.

The sending such a letter signed with INITIALS ONLY *is a sending of a letter* WITHOUT A NAME.

Both previous and subsequent letters may be received in evidence as explanatory of the letter set forth in the indictment.

Ch. XXIII. § 2. *What letters within the acts.*

Cambridge coffee-house, &c. on Thursday next; and on the same day a line shall be sent by a porter to acknowledge the receipt; after which, if you will name any evening to take a bottle of wine at the King's-Head tavern or elsewhere, I will with pleasure attend you: our meeting is however to be private and tetê a tetê. Thus possibly over the ashes of the MS. a phœnix may arise that may prove the forerunner to friendship," &c.

(Signed) "R. R."

Subsequent letters explanatory of the one stated in the indictment given in evidence.

A subsequent correspondence between the prosecutor and prisoner was also given in evidence; in the course of which the prisoner communicated a few pages of the supposed MS. in verse, from which the charge alluded to was to be plainly inferred.

Several objections were urged on the part of the prisoner, which were reserved for the opinion of the Judges; and Mr. Justice Lawrence left it to the jury to say whether the prisoner sent the letter of the 12th of January, and whether it contained a threat to publish a libel on the prosecutor, imputing to him the death of Daniel Dolly, unless he would send him a bank note; and if they were of that opinion, they were directed to find him guilty. The jury found him guilty; and also found specially, that the prisoner sent the letter in the indictment, and that it contained a threat to publish a libel imputing to the prosecutor the murder of his master, in order to extort money from him.

The objections were argued before all the Judges on the 8th of June 1796, when they were of opinion with the prosecutor on all the points made in argument, and which were afterwards noticed by Mr. Justice Buller, who delivered their opinion at the next sessions at the Old Bailey as follows:

MS. Buller J.

Four objections have been made against this conviction; 1. That this is not a letter *without a name*. 2. That it does not contain a *threat* or *demand*, so as to bring the case within the stat. 9 Geo. 1. c. 22. 3. That a bank note is not a valuable thing within the meaning of that act. 4. That supposing this case to fall within the words and meaning of that statute, yet it is the precise offence described by the subsequent statute of the 30 Geo. 2. which, making it a misdemeanor only, is a virtual repeal of the prior act of the 9 Geo. 1. on which this prosecution is founded. As to the first,

Ch. XXIII. § 2. *What letters within the acts.*

first, whether the letter be with or without a name, is a simple fact appearing on the face of the letter itself. It is signed with two letters R. R., which are so far from being a name, that no man on looking at the letter only can tell whether it meant to refer to any name, or what that name was. The second and third objections depend on the words of the stat. 9 Geo. 1. and the true construction of that act. The words of the enacting clause speak of *a demand* generally, without requiring any particular circumstances other than its being by letter without a name, or in a fictitious name, to accompany that demand. But the preamble of the act recites, that several persons had of late associated themselves under the name of Blacks, and entered into confederacies to assist one another in stealing deer, robbing warrens, and other illegal practices, and had in great numbers, armed with offensive weapons, several of them with their faces blacked, or in disguised habits, unlawfully hunted, &c. " and have sent letters *in fictitious names* to several persons *demanding* venison and money, and threatening some great violence if such their unlawful demands should be refused," &c.: and it was contended for the prisoner, that the enacting clause ought to be restrained by the preamble, or at least so far that *the demand* must be direct and peremptory, and accompanied with a threat of bodily harm. Where the enacting clause of a statute refers to such offences only as are mentioned in the preamble, it may thereby be controlled or restrained; but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions if it were so restrained. It is no uncommon thing for a statute to recite a particular mischief as the cause of making the statute, and yet for the enacting part of it to embrace more general objects, and to extend to other cases, which the Legislature thought within equal mischief. If the enacting clause in this act were to be restrained by the preamble, it would apply only to cases where several persons had joined together; where the letter was written in a fictitious name only; and where the thing demanded was either venison or money. But the enacting clause in express words applies to a single offender; to a letter sent *without a name* as well as to one signed *with a fictitious name*; and to a demand of *any valuable thing* as well as of money or venison; and to all

Vide preamble, ante, 1107.

Ch. XXIII. § 2. *What letters within the acts.*

demands by such letters, *whether accompanied with a threat of bodily harm, or not.* I agree that a mere request, such as asking charity, without imposing any conditions, would not come within the sense or meaning of the word *demand* (*a*): but here the demand is, as the jury truly said when they found a general verdict of guilty, under a threat to publish a libel attributing to the prosecutor the murder of his master. Whether the letter do amount to such a demand or not is a question which the Judges are bound to pronounce upon reading it as it is set out on the record; and they are all clearly of opinion that it is a demand within the true intent and meaning of the statute. It is a demand of money or money's worth, (which a bank note is), by means of holding out a threat to impute murder to the prosecutor, and to blast his fame and character, and not a request of voluntary charity. That a bank note was a valuable thing at the time when the demand was made was rightly admitted by the prisoner's counsel; but it was contended, that it was not so when the statue 9 Geo. 1. was made, because it was not then the subject of larceny. The judges however are all of opinion, that if the thing demanded be valuable at the time that the demand is made, that is sufficient (*b*), though the thing demanded did not exist, or the value of it was not known when the statute was made. But in truth it was a valuable thing at the time that the statute was made, though in might not come under the denomination of goods and chattels, or be the subject of larceny; for it was the evidence of a debt; it might at any time be turned into cash, and was to the owner of the value of the money for which it was given. 4. The only remaining question is, whether the statute 9 Geo. 1. on which this prosecution is founded were repealed by the stat. 30 Geo. 2. c. 24. It was truly contended, that if one act of parliament make a particular case a capital offence, and a subsequent act make the *same case* only a misdemeanor, the last act is a repeal of the former: and so it was decided in Davis's case, in November 1783, on

Ante, 609.

(*a*) Upon the debate of this case Eyre C. J. said, "*a demand* (within the act) "must be something more than asking: it is a requisition in the shape of forcing." And another of the Judges observed, that it meant "asking money, &c. and holding out a threat at the same time to enforce it."

(*b*) Lord Kenyon C. J. and Eyre C. J. expressly declared themselves of this opinion on the debate.

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the very act of the 9 Geo. 1. which makes it a capital offence to kill, wound, or destroy, any deer in any forest or park, the statute 16 Geo. 3. c. 30. having made that offence *in the same words* a misdemeanor only. But if the two statutes are consistent and can both stand together, the rule does not apply, and the last act will not be a repeal of the first. Here the stat. 9 Geo. 1. extends to such cases only in which there is an *actual demand;* and the stat. 30 Geo. 2. reaches cases which fall short of a demand, and includes letters sent *with a view or intent* to extort money, though no demand be made. The consequence is, that neither of the objections is well founded, and the conviction is right.

Ch. XXIII. § 2. *What letters within the acts.*

Upon the conference on the above case it was agreed by all the Judges, that if the indictment were framed upon the stat. 30 Geo. 2. and a demand proved, there must be an acquittal.

John Jepson and George Springett were indicted upon the stat. 27 Geo. 2, c. 15. for sending to the prosecutor Mr. Woodgate the following Letter.

Jepson and Springett's case, Essex Sum. Ass. 1798, cor. Lord Kenyon C. J. MS. Jud.

March 3d 1798.

Mr. Woodgate—Sir, I am very sorry to acquaint you that we are determined to set your mill on fire, and likewise to do all the public injury that we are able to do you, in all your *farms and seteres* (*a*) which you are in possession of, without you on next —— (*b*) day release that Ann Wood which you put in confinement. Sir, we mention in a few lines, and we hope if you have any regard for your wife and family, you will take our meaning without any thing further; and if you do not we will persist as far as we possibly can, so you may lay your hand at your heart and strive your uttermost ruin. I shall not mention nothing more to you, until such time as you find the few lines a fact, with our respect. So no more at this time from me,

R. R.

It was proved that the letter was of the hand-writing of Jepson, and that it was thrown by the other prisoner into Mr. Woodgate's yard, from whence it was taken by a servant of Mr. Woodgate and delivered to him. Mr. Woodgate

Conviction on the 27 Geo. 2. c. 15. for sending a letter to the prosecutor threatening "to set fire to his "mill, and likewise to do all "the public injury they were "able to him in "all his farms "and seteres;" held wrong; he not then having any MILL *to which the threat of burning would apply (having parted with it three years before), and the threat as to the* FARM, *&c. not necessarily implying a* BURNING.

(*a*) By this was understood *settings* or lettings. The whole letter was evidently the production of an illiterate person, being falsely spelt nearly throughout.

(*b*) The word here was unintelligible in my copy.

Ch. XXIII. § 2. *What letters within the acts.*

gate swore that he had had a share in a mill three years before this letter was written, but had no mill at that time. That he held a farm when the letter was written and came to his hands, and still holds it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the act of parliament. (27 Geo. 2. c. 15.)

At a conference of the Judges, after conviction, in Michaelmas term 1798 (absent Eyre C. J.) it was agreed that the prosecutor having no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. But as to the rest of it, Lord Kenyon C. J. and Buller Justice were of opinion that the letter must be understood as also importing a threat to burn the prosecutor's farm-house and buildings: but the other Judges not thinking that a necessary construction, the conviction was holden wrong, and a pardon recommended.

Girdwood's case, post. s. 4.

But in Girdwood's case after mentioned, a letter accusing the prosecutor of having taken away the life of a friend of the writer's, who was *come to revenge him*, was ruled to be evidence to go to the jury upon a charge of sending a letter threatening *to kill and murder* the prosecutor.

Heming's case, Warwick Sum. Ass. 1799, cor. Chambre B. MS. Jud.

A threatening letter, referring in the terms of it to such circumstances as were plainly intended to denote who the writer was, and making a demand of a sum of money in controversy between him and the prosecutor, which the latter had received, and which the former had before insisted should be accounted for to him, is not a threatening letter within the stat. 9 Geo. 1. c. 22. *or* 27 G. 2. c. 15. *although the writer did not subscribe his name.*

John Heming was indicted for sending a threatening letter to William James, an attorney at Henley, without any name subscribed to it. The indictment consisted of four counts, two upon the stat. 9 Geo. 1. c. 22. describing the letter as a letter demanding money, and the other two on the stat. 27 Geo. 2. c. 15. describing it as a letter threatening to kill and murder. The letter produced in evidence was directed to William James the prosecutor, and was in the following words, corresponding with the description in the indictment: "Mr. James, before I put my intentions in force I thought "it proper to acquaint you with the same. I am determined you shall die with a leaden fever if you don't pay the "money you have taken out of the court of King's Bench; "as I can't rest to think of the usage I received from you: "it is worse than murder." This letter was proved to be in the hand-writing of the prisoner, who sent it to the post-office, from whence it was sent in the usual manner to the prosecutor. But it also appeared in evidence that the prosecutor had formerly been employed in his profession as an attorney

torney by the prisoner's deceased mother in her lifetime: that in the course of that employment he had, as her attorney, received a sum of 20*l.* and upwards out of the court of K. B.: and that the prisoner, who had been reduced to great poverty, had conceived an opinion that the prosecutor had wronged him by not accounting for that sum. That for five or six years last past the prisoner had very frequently demanded the money, and abused the prosecutor very much for refusing to pay it, threatening to set fire to his house, and using other menaces. That this was done most frequently when he was in liquor, and on many occasions when he was sober. That the prosecutor had frequently corresponded with the prisoner, and was well acquainted with his hand-writing: and that the letter in question was written in his usual manner without any disguise of the character. The jury found the prisoner guilty; but Chambre B., before whom he was tried, respited the sentence in order to take the opinion of the Judges, whether as the transactions previous to the sending of the letter, the hand-writing, and the contents of the letter itself, shewed clearly who was the writer, and that he could have no intention to conceal himself; the case came within the meaning of either of the acts of parliament, although no name was subscribed to the letter. On the first day of Michaelmas term 1799 all the Judges assembled held that the conviction was wrong: for the prisoner making himself known in the letter, was the same thing as if he had signed his name to it; and therefore such a letter was not within the true spirit of the acts. He was accordingly recommended for a pardon.

Ch. XXIII. § 2. *What letters within the acts.*

(Absent Buller J.)

§ 3. *Distinctions between the several statutes as to names.*

It is evident from the whole scope of the acts of the 9 Geo. 1. and 27 Geo. 2. making the offences therein described felony, that they were levelled against such whose intention it was (by writing such letters either without names or in fictitious names) to conceal themselves from the knowledge of the party threatened, that they might obtain their object by creating terror in his mind without incurring danger and responsibility themselves. In this respect the subsequent act of the 30 Geo. 2. c. 24. which only makes the offence a misdemeanor, though punishable with transportation, is very differently worded from the other two, for it extends to any letter "*with* or without *a name*," &c. *or* signed

Ch. XXIII. § 3. signed with a *fictitious* name, &c.; and therefore it may well include letters (in other respects within the scope of it), though signed in the writer's real name.

Distinction between statutes.

Letters, writing, and messages.

It is also observable that the latter statute has the word "*writing*" as well as "*letter*," which is not included in the enacting part of the prior statutes, though it occurs in the preamble to the first of them, and the stats. 12 Geo. 1. and 22 Geo. 2. extend even to *messages*.

Thing demanded.

Another difference between the several acts is with respect to the thing demanded: this under the stat. 9 Geo. 1. must be "money, venison, or other valuable thing:" which latter description includes a bank note, as was before shewn in Robinson's case. But under the stat. 27 Geo. 2. the guilt is incurred, though there be no demand made of any thing in the letter: and the stat. 30 Geo. 2. only reaches cases where the letter falls short of an actual demand, but is sent "with intent to extort or gain *money*, *goods*, *wares*, *or merchandise*."

Ante, s. 2.

Intent.

Major's case, O. B. June 1796, and before all the Judges in Mich. T. 1796, MS. Buller J. and MS. Jud.

Indictment on the stat. 30 Geo. 2. c. 24. *for sending a threatening letter* intending to extort and gain money, *cannot be supported by shewing a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain bill drawn by the prisoner, of which the prosecutor was the holder.*

In Edward Major's case the indictment charged that the prisoner *intending to extort and gain money* from one Augustine Rayner, unlawfully, knowingly, and designedly sent to the said A. R. a certain letter in writing, &c. thereby threatening, &c., and then set forth the letter as follows: "Sir, I "received a letter respecting the bill which I gave you "when we parted: and as you know I have it not in my "power to pay it; and if I had, it is an unjust demand; I "have only to observe, that if you do not immediately return "it to me as an acknowledgment for the obscene offence of "sodomy attempted upon me, &c. I am determined to pro"secute you to the utmost rigor of the law, &c. (Signed) "E. Major, (and dated) June 1st, 1796;" *with a view and intent to extort and gain money* from the said A. R. against the form of the statute, &c. The Judges, on reference to them after conviction, in Michaelmas term 1796 held the conviction wrong; for the letter was not sent to extort *money*, but to procure the delivery up of the *bill*.

§ 4. *What a sending of the letter.*

Further, the stats. 9 Geo. 1. and 27 Geo. 2. prohibit any person from "*knowingly sending*" any letter such as is therein respectively described. The stat. 30 Geo. 2. extends to such

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as "knowingly send *or deliver* the letters; and the stats. 12 Geo. 1. and 22 Geo. 2. to such as "write, or cause to "be written, or knowingly send or cause to be sent any "letter," &c.

Ch. XXIII. §4.
What a sending or delivery.

John Hammond and Mary Hammond were indicted on the statutes 9 Geo. 1. c. 22. and 27 Geo. 2. c. 15. for feloniously sending a threatening letter to Daniel Dancer, demanding the sum of 10*l.* The indictment consisted of twelve counts, one set charging that the prisoners sent and delivered the said letter; and another, that they caused it to be sent and delivered. It appeared in evidence that the prisoners were husband and wife, and lived as servants with the prosecutor. That Mary Hammond had written the letter in question, and that it was delivered to the prosecutor by John Hammond, who said he found it in the prosecutor's garden; but there was no evidence that he had any knowledge of its contents. On behalf of the prisoner it was submitted to the Court, that the offence described by the statutes on which the indictment was founded, was the "knowingly *sending* a threatening letter, &c.; but that the evidence only proved that the wife had written the letter, and that the husband had delivered it; and that there was no proof of its having been *sent* to the prosecutor. The Court agreeing as to the description of the offence in the statutes, observed, that in cases so highly penal as the present it was necessary not only to consider the intention of the Legislature, but to bring the offender within the words of the statute. That the mere act of *writing* a threatening letter would not constitute the offence; for unless the writer or contriver of such a letter afterward sent it to the party whose fears it was calculated to alarm, it could not produce the mischief which the Legislature intended alone to suppress; and they had accordingly adapted the words of both the statutes to that exigency, viz. if any person shall *send* "any such letter, &c. he shall be guilty of felony," &c. That it was impossible to conceive, that *carrying* a letter could by any construction be comprehended under the words "*send* any letter," which were the precise terms in which the statutes were penned. That the Court was not to consider what the Legislature would have done if they had contemplated such a case as the present, but to look at the words they had used, and to construe them according

Hammond's case, O. B. May 1787, cor. Ashhurst J. and Perryn B. 2 Leach, 499.
Where the wife wrote a threatening letter, and the husband CARRIED *it to the party threatened; held that the husband, though privy to the writing, was not within the statutes* 9 Geo. 1. *and* 27 Geo. 2.; *nor could the wife alone be convicted, unless she wrote and sent it without the husband, who delivered it, being privy to the contents.*

Ch. XXIII. § 4. *What a sending or delivery.*

according to the meaning which it was most likely they entertained at the time the subject was under their consideration. Then at the time those statutes passed, it seemed that the Legislature never had it in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived. They undoubtedly conceived that such a letter would be sent by the post, or by some secret conveyance, so as to prevent the discovery of the person by whom it was sent. It was clear therefore that the act of delivering a threatening letter was not the offence described in the statutes of 9 *Geo.* 1. *c.* 22. and 27 *Geo.* 2. *c.* 13. But if any doubt could be entertained upon that point, the Legislature itself had removed it; for by the subsequent act of the 30 *Geo.* 2. *c.* 24. the offence of *delivering* as well as *sending* a threatening letter was made a misdemeanor, punishable in the discretion of the Court, according to the circumstances of the case. That statute made it evident, that where the Legislature intended to extend the description of the offence, they knew how to make use of proper words to express that intention; and it shewed that they had it not in contemplation to make the *delivery* of a threatening letter felony, when the statutes on which the present indictment was founded were passed. But, as the Court further observed, there was still a question in this case for the consideration of the jury; for though Mary Hammond were the wife of the other prisoner, yet if the jury were of opinion that she wrote the letter herself, without any interference of her husband, and sent it by him, without his knowing any thing of the contents, to the prosecutor, she alone might be found guilty; but otherwise, both the prisoners must be acquitted. The jury upon this direction acquitted both the prisoners.

Girdwood's case, O. B. Feb. 1776, MS. Crown Cas. Res. and MS. Gould and Buller Js. (1 Leach, 169. S. C.)

Evidence that the prisoner delivered a threatening let-

Archibald Girdwood was charged on the stat. 27 Geo. 2. c. 15. in the first count of the indictment generally for feloniously sending a certain letter in writing with the fictitious letters of J. W. subscribed thereto, to one John Edridge, &c. threatening to kill and murder him. The second count was for sending a letter to the same purport, setting out the letter in words and figures as follows:

"Sir,

" Sir, " Feb. 9, 1796."

" I am sorry to find a gentleman like you would be " guilty of taking M'Allester's life away for the sake of two " or three guineas; but it will not be forgot by one who is " but just come home to revenge his cause. This you may " depend upon, whenever I meet you I will lay my life for " him in this cause. I follow the road, though I have been " out of London; but on receiving a letter from M'Alles- " ter before he died, for to seek revenge I am come to town. " I remain a true friend to M'Allester.

" J. W."

What a sending, &c.

A letter sealed up to another by whom it was put in the post, and so conveyed to the prosecutor, is sufficient to go to the jury that he sent such letter knowing the contents.

A letter accusing the prosecutor of having taken away the life of a friend of the writer's, who was come to revenge him, is evidence to go to the jury of sending a letter threatening to kill and murder the prosecutor.

The trial may be where the prosecutor received the letter by the post, though delivered by the prisoner, and put into the post in another county.

Edridge proved the receipt of the letter by the penny post at his house in Davis street, Berkeley-square, which is in the county of Middlesex; and his tracing it up to one Elizabeth Robinson, who swore that she was employed in going errands for the prisoners in Newgate; and that having on the 9th of February received this letter from the prisoner's hands at the grate at Newgate, she immediately carried it to the post-office in Newgate-street. The servant of the office-keeper confirmed her account: and both swore to the identity of the letter, the direction being in a remarkable hand.

Mr. Baron Hotham directed the jury, which was of Middlesex, to consider, 1st, Whether from the prisoner's delivering the letter he knew the contents of it? 2dly, Whether they thought the letter itself contained in the terms of it an actual threatening to kill and murder? If they were of opinion that it did, and that the prisoner knew the contents of it, they ought to find him guilty; but if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they should acquit him. The jury found him guilty; but judgment was respited to take the opinion of the Judges on the following points: 1. Whether there were sufficient evidence to be left to the jury of the prisoner's sending the letter *knowing the contents?* 2. Whether the letter purported to be a letter threatening to kill or murder? 3. Whether the prisoner were properly tried by a Middlesex jury; the letter, though received by Edridge in Middlesex, having been delivered by

Ch. XXIII. § 4. *What a sending, &c*

the prisoner to E. Robinson in London, and by her put into the office, which is also in London?

(Absent De Grey C. J. and one place vacant.)

Vide Lloyd v. Maund, 2 Term Rep. 760. S. P.

In Easter term 1776, ten Judges present were all clearly of opinion that the conviction was right. They thought that the construction of the letter was properly left to the jury; as also whether the prisoner knew the contents of it; and that there was no objection to the trial being had before a Middlesex jury. The prisoner was afterwards executed.

Ante, 1116.

In Heming's case, the letter was also sent by the medium of the post.

Lloyd's case, post. s. 5.

In Lloyd's case, the letter was dropped in a vestry-room frequented by the prosecutor every Sunday morning, where it was picked up by the sexton and given to the prosecutor: and Mr. Justice Yates had no doubt but that this was a sending within the act.

Ante, 1115.

So in Jepson and Springett's case, the letter was thrown into the prosecutor's yard, from whence it was taken up by the prosecutor's servant and delivered to him.

Indictment and Evidence.

§ 5. *Indictment and evidence.*

2 MS. Sum. 329. *Vide* Cr. Cir. Comp.

Lloyd's case, Hereford Sp. Ass. 1767, cor. Yates J. MS ut supra and MS. Buller J.

Indictment for sending a threatening letter must set out the letter.

Stating that the prisoner sent such a letter, directed to the prosecutor, &c seems sufficient, without expressly alleging that the prisoner sent it to the prosecutor.

The indictment for sending an incendiary or threatening letter must set forth the letter itself, that the Court may judge whether it be one of that kind which falls within the purview of the respective statutes.

In Lloyd's case, who was tried by Mr. Justice Yates, the indictment only followed the words of the Black Act (9 Geo. 1. c. 22.), and charged that the prisoner "knowingly, "unlawfully, wickedly and feloniously, did send a certain "letter in writing, without any name subscribed and signed "thereto, directed to one Edward Salway, by the name of "Edward Salway Esq. demanding money, to wit, 100 gui-"neas, &c. to the great damage of the said E. S. and against "the form of the statute, &c." After conviction, it was moved in arrest of judgment, that the indictment was bad in two respects; first, Because it did not charge that the Defendant *sent* the letter *to Mr. Salway* the prosecutor, but only that he *sent* (without saying to whom) a certain letter *directed to Mr. Salway*. Secondly, Because neither the letter nor even the substance of it was set forth in the indictment.

ment. The learned Judge, in reporting the case afterwards to the rest of the Judges, observed, as to the first objection, that it had no degree of weight with him: for it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands. The fact being that the prisoner dropped the letter into a vestry-room which Mr. Salway frequented (*a*) every Sunday morning before service began, from whence the sexton had picked it up and delivered it to him. But the second objection seemed to him a very strong one; and therefore he respited judgment for the opinion of the Judges upon it. It was argued for the prosecutor that this indictment pursued the very words of the statute 9 Geo. 1. c. 22., which in general cases was holden to be sufficient. That the Defendant was charged with sending this letter "feloniously, and contrary to the form of the statute;" and that those words import that the letter was of such a nature as the statute had in view. That the jury had found the Defendant guilty to the whole extent of that charge; and therefore it must be taken that the letter which was proved to the jury, and upon which their verdict was founded, was a menacing letter, and within the true meaning of the statute. That if it were not such a letter it was to be presumed that the prisoner would have been acquitted, as all these trials were superintended by a Judge who must be supposed to give proper directions to the jury. In answer, it was admitted that in general cases, if an indictment on a statute pursued the words of the statute itself, it was sufficient; but those were cases where the words of the statute contained a complete description of the offence. But when

Ch. XXIII. § 5. *Indictment and evidence.*

(*a*) Qu. Whether if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending *to such party*, supposing such an allegation to be necessary upon the true construction of the acts? The same sort of evidence was given in Springett's case, before mentioned, in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form. Upon the whole, it became unnecessary for the Judges to give any opinion on this point of the case in question. Ante, p. 1115.

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Ch. XXIII. § 5. *Indictment and evidence.*

the statute related to a particular kind of letter, the indictment should state the letter itself, that the Court might see whether it were one of that kind. That in every indictment a complete offence must be shewn, so as to enable the Court to give judgment upon it in case a demurrer were joined or a writ of error brought. But if the words "feloniously" and "contrary to the statute" should be deemed sufficient, it would leave the construction of the law to the jury. That in all indictments of forgery the instrument forged must be set forth, that the Court might see that is was one of that kind which fell within the purview of the statute. Mr. Justice Yates further stated, that he had since caused inquiries to be made into the practice of the Old Bailey, and upon the Western and Home Circuits, and found that in all indictments upon this act of parliament the letter itself was generally set forth. And that the clerks did not remember an instance where the indictment did not state at least the substance of the letter. In Trinity term following the Judges were consulted on this case; and they were of opinion that the indictment was bad in not setting forth the letter itself. For if the words "feloniously and contrary to the form of the statute" were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law.

Not only the letter itself must be truly set out in the indictment, but the alleged intent of the writer in sending it must be such as is consistent with and deducible from the letter. Therefore, where, in Major's case, the allegation was, that the letter was sent to extort *money*, and it appeared upon the face of it to have been sent with a view of procuring the delivery up of a bill of exchange, the allegation was holden not to be sustained.

Major's case, ante, 1118.

§ 6. *Evidence.*

It appears from Robinson's case, before mentioned, that prior and subsequent letters from the prisoner to the party threatened may be given in evidence as explanatory of the meaning and intent of the particular letter on which the indictment is framed.

Robinson's case, ante, 1110.

Trial.

§ 7.
Trial.

Under the 14th clause of the act of the 9 Geo. 1. c. 22. the trial may be had in any county in England at the option of the prosecutor. But no express provision is made to extend the same privilege to cases falling under either of the statutes of Geo. 2., which must therefore be governed by the general rule. If it be a necessary ingredient in this offence that the threatening letter should come to the hands of the party threatened, then it seems that the county wherein it is so received is that in which the trial should properly be had, because till then the offence is not complete. But if the mere act of *sending* such a letter with intent that the threat therein contained should reach the prosecutor, constitute the offence, a construction which the words of the enacting clauses will satisfy, and which may be thought to be confirmed by the opinion of Mr. Justice Yates in Lloyd's case; then it follows that the trial may be had in any county into which the letter goes in the progress of such sending. It has indeed been sometimes contended on behalf of a prisoner indicted where the letter was received, that the trial could only be had in the county where the original sending by the act of the prisoner himself was proved: but this has been over-ruled; and the venue has been holden to be well laid in the county in which the letter was received by the party to whom the threat was addressed. But I can find no case where the venue has been laid in any other than that county where this point has come in judgment. In Girdwood's case the trial was had in the county where the threatening letter was received. And so it was in the following case.

Vide Mortis's case, ante, 1032.

Vi. ante, 1119.

Ante, 1122.

Ante, s. 4.

An indictment on the stat. 30 Geo. 2. against two Defendants for sending a letter to the prosecutor, threatening to accuse him of an unnatural crime, with intent to extort money from him, laid the offence in Middlesex, but the letter was dated from Maidstone in Kent. The sending it was proved by the Defendant's confession. It was objected that as the letter was dated and sent by the post from Maidstone, the fact of the sending, which constituted the offence,

Esser's case, Westminster Sittings after Trin. 7 Geo. 3. MS. Buller J. *The offence of sending a threatening letter may be laid in the county where it is delivered by the post.*

Ch. XXIII. § 7. *Trial.*

offence, was committed in Kent, and the indictment would not lie in Middlesex. But Lord Mansfield C. J. held, that as it was directed to the prosecutor in Middlesex, where it was delivered, that was a sending in Middlesex; for the whole was to be considered as the act of the Defendant to the time of the delivery in that county.

LAW-BOOKS

Published by P. Byrne,

And for sale at his Law-Bookstore, No. 20, South Sixth-street, Philadelphia, and No. 128, Baltimore, or Market-street, Baltimore.

1. EAST'S REPORTS of Cases argued and determined in the Court of King's Bench, with Tables of the names of Cases and principal matters. In 6 volumes, commencing 1800, ending 1805. 30 dolls.

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☞ These Reports may be considered as a new series or continuation of Durnford and East's Reports, 8 vols. (printed and for sale at Byrne's.) Mr. East is continuing his Reports; as they appear Byrne intends to publish them, as well as the following.

2. REPORTS in the Courts of Exchequer and Common Pleas, by *Bosanquet and Pullen.* 3 vols. are already published, commencing 1796, ending 1804 18 dolls.

3 DALLAS'S REPORTS of Cases ruled and adjudged in the *several Courts of the United States*, and of Pennsylvania, held at the seat of the Federal Government, 3 vols. 15 dolls Any volume may be had separate at 6 dolls. The fourth volume is now in press, and will comprise,

1. Reports of Cases *in the Supreme Court of the United States* during the years 1799 and 1800, terminating with the removal of the seat of the Federal Government from Philadelphia to Washington.
2. Reports of Select Cases *in the Circuit Court of the United States* for the Pennsylvania District.
3. Reports of Select Cases of Fiscal Jurisdiction in the *District Court of Pennsylvania.*
4. Reports of Select Cases in the *High Court of Errors and Appeals* of Pennsylvania
5. Reports of Select Cases in the *Supreme Court* of Pennsylvania.

An Appendix.

August, 1804.

Subscriptions received for Mr. Dallas's 4th volume of Reports by the publisher, and the booksellers throughout the United States, and for the following most valuable book to the profession.

Reports of the most learned Sir Edmund Saunders, Knt. late Lord Chief Justice of the King's Bench, of several Pleadings and Cases in the Court of King's Bench, in the time of the reign of his most excellent majesty king Charles the second. With three Tables: the first, of the Names of the Cases; the second, of the Matters contained in the Pleadings; and the third, of the principal Matters contained in the Cases. The third edition. With notes and references to the pleadings and cases. By John Williams, Serjeant at Law. In two volumes, divided into three parts.

From the Annual Reviews for 1802.

One of the most valuable books of Reports ever given to the profession of the law, was that of Sir Edmund Saunders, Lord Chief Justice of the court of King's Bench, in the reign of Charles II. It contains the records at length of each case before the court, and in a very concise and clear manner states the objections and arguments of the counsel, and opinions of the Judges. As Saunders was deeply versed in the science of special pleading, and was himself counsel in most of the cases he reported, the points discussed are given with clearness, and with a truth to which a special pleader more readily attains, whose habits sharpen the mind to a quick perception of legal distinction, and discipline it in a close adherence to the severest logic. These

These Reports were first published, the records in Latin, and the arguments in French, in the year 1686. A superior edition came out in 1722. In 1799 the present editor, Mr. Serjeant Williams, published a first volume, and he has now completed his work by this second volume, in two parts.

This edition is not merely enriched with many references to new authorities, but the editor has added numerous and very long notes; in which he has discussed with an industry, an accuracy of discrimination, and an extent of legal research and learning, rarely excelled, most of the heads of the law connected with the subject of the reports. This second volume contains a dedication to Lord Eldon, a second preface, and a most useful index to the notes.

The skill with which these notes have been composed has been correspondent to the judicious and excellent object of them. The editor declares, in his prefaces, that they were written, as well with a view of inciting the student to a diligent perusal of the pleadings, and giving him a knowledge not only of the excellence or defects of those before him, but of the grounds and reasons upon which the rules of special pleading and practice were founded, and the variations which modern times had adopted from older forms; as of affording the more experienced a useful book upon the circuits, where many cannot be referred to. With these intentions, Mr Serjeant Williams has digested into them the doctrines and authorities relating to most kinds of practice and special pleading, and many of general laws. Several are complete, though concise treatises upon their respective subjects. To expatiate upon the utility of such a work is superfluous. Every lawyer will read it with interest and advantage.

LAW OPINIONS OF THIS WORK.

South Third-street, January 14th, 1806.

SIR,

I am happy to find that you propose reprinting Serjeant Williams' edition of Saunders.

The merits of that accurate reporter have long been recognised, but it is not perhaps going too far to say that they are fully equalled by his commentator; a body of notes so luminous, correct, and comprehensive, has not perhaps appeared since Chief Justice Coke's Commentary on Littleton.

The book appears to have met with the most favourable reception in England, and I should suppose it an impeachment of the knowledge and judgment of the Profession in this country to doubt the success of your intended impression. I am, very truly, your most obedient servant,

WILLIAM RAWLE.

Mr. P. Byrne.

Northumberland, 20th March, 1806.

DEAR SIR,

I am very glad to hear that you mean to republish Serjeant Williams' edition of Saunders. I know of no reporter so well edited or any law book that has called forth more decided approbation from the persons best qualified to judge of its merits.

" In the case cited from that excellent book, the Reports of Saunders (says Lord Eldon) made still more excellent by a late edition," &c. 2 Bos. & Pull 23. See also 2 Bos. & Pull. 19. 387.

" The cases are very accurately stated in my brother Williams' edition of Saunders, (says Lord Alvanley, 3 Bos. & Pull. 178.) and I cannot lay down the principle in better terms than he has used."

" I will not go (says Lord Kenyon, 1 East, 428.) through all the cases, because they are collected with great ability by Mr. Serjeant Williams in a note in his edition of Saunders' Reports to which I refer generally." See also 1 East, 95. *n.* 2 East, 53. 580. 3 East, 108.

3 East, 5. Hope v. Bagice, Lawrence Justice referred to the note by Serjt. Williams at the end of the case of Wheatly v. Lane, 1 Saunders. 216—219. where all the cases were collected with great ability.

I think I need not wish you success in this undertaking; for I fancy no lawyer will deem his library sufficiently furnished without a copy of this work. Your's truly,

THOMAS COOPER.

Mr. P. Byrne.